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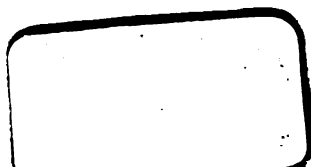
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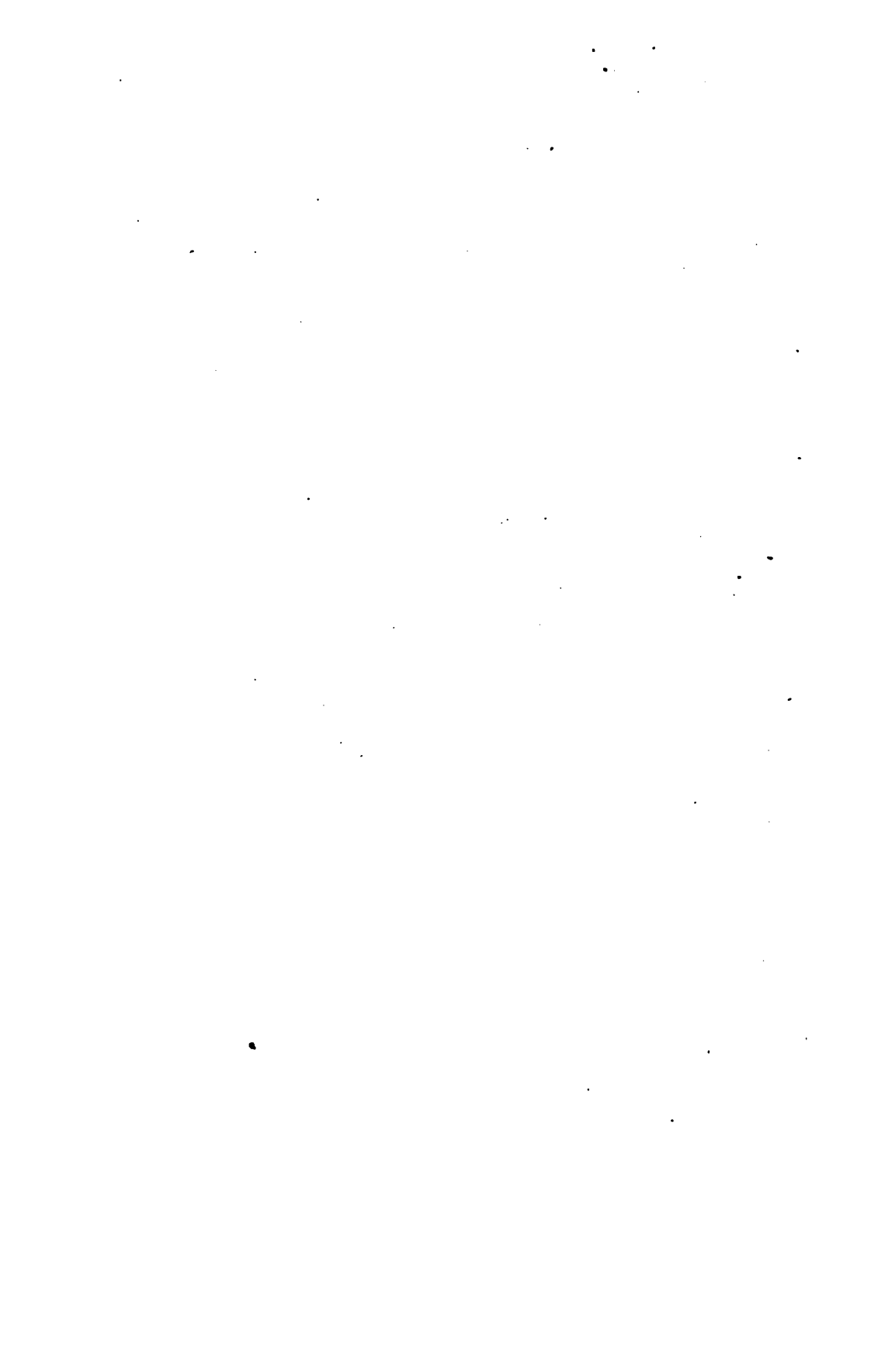
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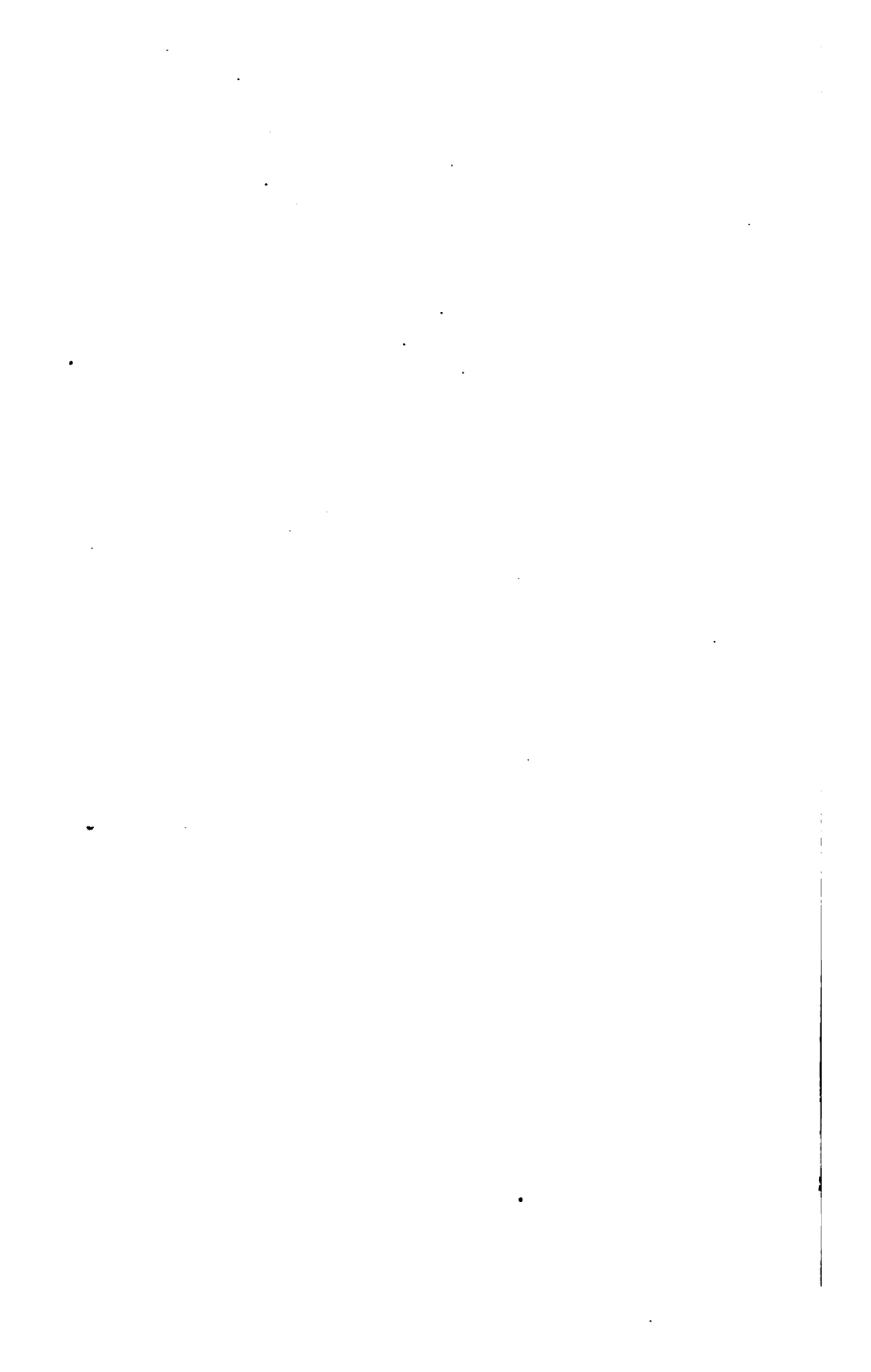
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EDITED BY
AUSTIN ABBOTT.

VOL. IV.

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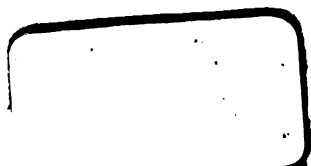
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Ratcliffe v. Cary.

James v. Morey, 2 Cow. 285; reversing 6 Johns. Ch. 417;* Starr v. Ellis, *Id.* 393; 1 Greenl. on Ev. 201.

BY THE COURT.—J. M. PARKER, J. [After stating facts.]—I think the referee was right in holding that the defendant could not be compelled to satisfy the mortgage as to the interest held by the mortgagees, unless they were parties to the suit.

It is insisted, that the referee has found as a fact, that the plaintiff purchased the interest of the mortgagees for one hundred and eighteen dollars, and knew that they have no farther interest in it, and so are not necessary parties. Taking the whole of the referee's report together, the finding of fact does not warrant that assumption. The most that can be said is, that the purchase was a conditional one, the security of the mortgage for the one hundred and eighteen dollars, to remain in the mortgagees until the money was paid, or otherwise secured.

In this view, even if the mortgagees were parties, the view of the supreme court at general term is correct, that the plaintiff would be entitled to a satisfaction of the mortgage, only upon payment of the one hundred and eighteen dollars.

The judgment is clearly right, and should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

RATCLIFFE v. CARY.

September, 1867.

Course and distance, in the description in a deed, do not control, where the land cannot be plotted from the deed.

Where a lapse of time, and the destruction of the monument given in the deed as the point of beginning, render the precise location uncertain, evidence of the existence of monuments such as a line of marked trees, with circumstances under which the jury might believe that

* As to merger, see 1 Wend. 484; 1 Edm. 279.

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line to have been acquiesced in by the parties as a boundary for more than fifty years, makes the question of boundary one for the jury.*

On the question of the practical location of a boundary, it is competent to ask a witness whose residence and relation to the parties has been such that, had there been a difference between the adjoining proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line.

It is competent to prove by a surveyor, that the courses and distances in a deed are incongruous, and that all the lines indicated by monuments, differ in length from the deed.

Richard Ratcliffe sued H. N. Gray, in the supreme court, for trespass on lands. The only question was, the location of their boundary line. In March, 1807, James Cary conveyed to Samuel Cary the land now owned by plaintiff, and, at the same time, to Bela Cary the adjoining land now owned by defendant. In the deed of the former lot, the description began at a stake, &c., in a hemlock stump, E. thirty-nine and a half degrees S. from the center of the highway. Thence the first two lines were described as running northerly, by course and distance, to a stake; and the next line, the northerly boundary, ran thence westerly thirty-two rods, but no monument was referred to for its terminus. The next and last line, the disputed boundary, was described as running southwest, by course and distance, to the place of beginning.

At the time of this action, the hemlock stump, at the point of beginning, was gone; but wherever it may have stood, the premises could not be exactly designated from course and distance, for there was a discrepancy of thirty-eight links in northings and southings, and of one chain, four links in eastings and westings.

Plaintiff claimed that the northern boundary ran westerly thirty-five rods, eleven links (instead of thirty-two rods), to a line of marked trees (which some evidence tended to show were marked by surveyors about the time of the deeds), and that this line had been established and recognized by the respective owners, ever since, as the westerly boundary; and had been defined, on the southerly and cleared part of the line, by a fence

* See also *Vosburgh v. Teator*, 32 N. F. 501.

built by them. There was also evidence that plaintiff's grantors had occupied up to this line, and that defendant's tenants had pointed it out to plaintiff as the line, when he came into possession.

Defendant claimed that plaintiff was bound by the termination of the line of thirty-two rods, mentioned in the deed. It appeared that, though the premises could not be exactly plotted in either way, in each they exceeded fifty acres.

At the trial, defendant moved for a nonsuit, on the ground above stated, which was denied, and verdict given for plaintiff.

The supreme court, on appeal from the judgment, held, in an opinion by BACON, J., that the chain of evidence to establish practical location and acquiescence for not less than fifty years was strong and continuous. That although defendant's claim, that where no monuments are referred to in a deed, the distances must govern, and that it is not possible for a party to get title to land beyond the prescribed boundary, is sound where it is applicable, and must be affirmed in a controversy between two parties both of whom are dependent solely on a paper title, it must fail of application where one party is relying on a practical location, as in this case (*Baldwin v. Brown*, 16 N. Y. 359); and the fact that by the verdict, plaintiff obtained four acres more than his deed called for, was no ground for dispossessing him from that to which he had by location and acquiescence obtained a valid title, especially as defendant showed no paper title to the piece in controversy; and that according to the case of *Adams v. Rockwell*, 16 Wend. 285, a grant might be presumed after twenty years' acquiescence.

The defendant appealed to this court.

W. O. Merrill, for plaintiff, appellant;—Cited *Laub v. Buckmiller*, 17 N. Y. 620; *Jackson v. McConnell*, 19 Wend. 175; *Brady v. Hennion*, 8 Bosw. 528; *Seaman v. Hogeboom*, 21 Barb. 398, 406-7; *Jackson v. Freer*, 17 Johns. 29; *Jackson v. Ogden*, 7 Id. 238; *Rockwell v. Adams*, 7 Cow. 761-2; 6 Wend. 467; *McCormick v. Barnum*, 10 Id. 104; *Jackson v. McConnell*, 12 Id. 421; *Dibble v. Rogers*, 13 Id. 536; *Jackson v. Douglas*, 8 Johns. 367; *Jackson v. Smith*, 9 Id. 100; *Jackson v. Bowen*, 1 Cai. 363; *Jackson v. Vedder*, 3 Johns. 8; *Jackson*

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v. Dieffendorf, *Id.* 269; *Baldwin v. Brown*, 16 *N. Y.* 359; *Jackson v. Long*, 7 *Wend.* 170; *Davis v. Townsend*, 10 *Barb.* 334, 345-347; 16 *Wend.* 302; 13 *Id.* 536; *Hunt v. Johnson*, 19 *N. Y.* 279; *Clark v. Wethey*, 19 *Wend.* 320;* *Code*, § 83 (4) (3) § 84; *Munro v. Merchant*, 28 *N. Y.* 3-4, 9, 42; reversing 26 *Barb.* 383; 7 *Johns.* 5; 13 *Id.* 368; *Munroe v. Potter*, 22 *How. Pr.* 49; *S. C.*, less fully, 34 *Barb.* 358.

F. Kernan, for defendant, respondent;—Cited 2 *Cow. & H. Notes*, 1379, 1380, note 942; *Seaman v. Hogeboom*, 3 *Barb.* 215; *Clark v. Wethey*, 19 *Wend.* 320-4; 3 *Barb.* 215; 14 *Wend.* 680; *Adams v. Rockwell*, 16 *Id.* 285, 302, 304, 314;† *Kip v. Norton*, 12 *Id.* 127; *Jackson v. Van Corlaer*, 11 *Johns.* 123; *Baldwin v. Brown*, 16 *N. Y.* 359; 7 *Johns.* 238, 241; 8 *Id.* 367; 9 *Id.* 61; 16 *Wend.* 304-5, 310, 2, 3; *Jackson v. McConnell*, 19 *Id.* 175; 18 *Id.* 153-168; *Jackson v. Wilkinson*, 17 *Johns.* 146;‡ 19 *Wend.* 320, 323-5; *S. C.*, 3 *Barb.* 215, 219; 2 *Kent*, 466 (1 ed.), 516 (7 ed.); 1 *Cow.* 605; 5 *Id.* 371; 9 *Id.* 661.

BY THE COURT.—J. M. PARKER J. [After stating the facts.]—Upon the trial the defendant moved for a nonsuit, on the ground that the plaintiff had not shown a proper title to the premises, that he could not claim to hold by a practical location of, and acquiescence in the line claimed by him, but should be confined to, and controlled by his deed. The motion was denied, and defendant excepted, and this raises the principal question in the case.

The evidence showed, or tended to show, that the land along the northerly half of the disputed line has never been cleared upon either side; that upon the line claimed by the plaintiff, through the uncleared portion of it, is a distinctly marked surveyor's line, shown, by boxing a portion of the marked trees upon the line, to have been made at or about the time when the above mentioned deeds were given, and that the pieces conveyed to Samuel and Bela Cary, respectively, were surveyed out to them, at the time of the conveyances; that the south

* As to controlling effect of description, see 9 *N. Y.* (5 *Seld.*) 183.

† Commented on in 19 *Wend.* 320. As to boundary, see 47 *Barb.* 287.

‡ The construction of the grant approved, see 1 *Paine*, 497.

part of the fifty acres had been cleared before the making of the deeds, and the west line fenced along the clearing, and that this fence was in line with the marked trees, and formed with them, a continuous straight line; that it has ever since been maintained as a boundary line by the adjoining proprietors, and that the plaintiff and those under whom he claims, have ever claimed to own up to this line; that the plaintiff's grantors had, for a number of years after the giving of the deeds, made sugar along and up to this line, and had cut out the timber and underbrush, except the maple trees, along the line for that purpose; and had applied to and obtained the consent of Bela Cary to tap trees on the west side of this line; that defendant's tenants, when plaintiff took possession of the fifty acre lot, showed him the line of marked trees as the west line of the lot.

It also appeared that the hemlock stump described in the deed of fifty acres, as the starting point, was gone, and the respective surveyors disagreed in their location of it, and that, from the description in the deed, wherever the starting point might be, the premises could not be plotted, the northings and southings failing to balance by thirty-eight links, and the eastings and westings by one chain and four links. By whichever line the fifty acres is bounded, it overruns in quantity, and so with the one hundred and thirty-one acre piece.

Were there in these facts the elements of a practical location, and such acquiescence in it, as to bind the parties?

It was held, in *Baldwin v. Brown*, 16 N. Y. 359, that practical location and long acquiescence in a boundary line, are conclusive, not upon the notion that they are evidence of a parol agreement establishing the line, but because they are of themselves proof that the location is correct, that the "rule seems to have been adopted as a rule of repose, with a view to the quieting of titles; and rests upon the same reason as our statute prohibiting the disturbance of an adverse possession which has continued for twenty years."

Actual and continued possession of the premises adjoining the located line, is not essential to the existence of a practical location. It does not depend on a *pedis possessio* of the land adjoining, but its existence may be established by any com-

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petent evidence of the fact. When adjacent owners unite in surveying their respective lots and in marking a line upon the ground between them, such survey would, doubtless, constitute and be evidence of a practical location, and the line thus fixed, after a sufficient length of acquiescence, would, it seems, control the courses and the distances in the deeds. But especially would this be so, when the grant is, from its terms, or becomes from destruction of monuments, uncertain and ambiguous as to location. *Jackson v. Ogden*, 4 *Johns.* 140; S. C., 7 *Id.* 238; *Jackson v. Freer*, 17 *Id.* 29; *Jackson v. Smith*, 9 *Id.* 100; *McCormick v. Barnum*, 10 *Wend.* 104; *Jackson v. McConnell*, 12 *Id.* 421; *Adams v. Rockwell*, 16 *Id.* 285; *Reed v. Farr*, 35 *N. Y.* 113; *Clark v. Wethey*, 19 *Wend.* 320.

In *Adams v. Rockwell* (*supra*), the chancellor says: "Where there can be no real doubt as to how premises should be located, according to certain known boundaries described in the deed, to establish a practical location different 'therefrom which shall deprive the party claiming under the deed, of his legal rights, there must be a location which has been acquiesced in for a sufficient length of time to bar a right of entry, under the statute of limitations in relation to real estate." And in *Clark v. Wethey* (*supra*), Judge COWEN, after arguing against the doctrine which allows a practical location to control the courses and distances in the deed, says: "I speak not now of those cases in which time has obliterated the monuments or boundaries of the deed, so as to leave its location a matter of uncertainty; I speak not of cases in which the carelessness or fraud of parties, or any other causes, may have rendered it impossible to locate the deed by known monuments or mathematical lines: where this is so, the declaration of the parties, or their acts of acquiescence or forbearance, were always receivable."

Now, in the case at bar, the description in the deed, both from its terms and from the destruction of the monument given as the starting point, renders the precise location of the land intended to be conveyed uncertain. Then the existence of this line of marked trees, which the jury might believe, from the evidence before them, to have been made by the parties to the first two deeds, as the division line between the

lots, and the acquiescence which (as there was evidence tending to show) had existed in that line as the boundary of the lots respectively for more than fifty years, were sufficient to entitle the plaintiff to the judgment of the jury upon the question whether such practical location and acquiescence existed; and, consequently, the motion for a nonsuit was properly denied.

The defendant's counsel requested the court to charge the jury in the following words: "Where there are no monuments given in the deed, but courses and distances only, it must be controlled by the course and distance on that line." The judge refused to charge in that form, and the defendant excepted. But, upon that point, the judge did charge in the precise words of the request, with this addition: "This is so, if the line is run by the deed alone; but this proposition fails in its application to a case where the land cannot be platted from the deed." It is impossible, I think, to hold that here was any error. The effect of the unqualified instruction called for by the defendant would have been to hold the plaintiff absolutely to the thirty-two rods for the length of his north line, when, as we have seen, the facts in the case might, as the jury should find them, modify the length of that line with reference to the line of marked trees. This request was, in effect, similar to the one to nonsuit the plaintiff, and was properly refused.

The objections to the reception of evidence upon the trial were, I think, all properly overruled. The witness Kent, who lived with Samuel Cary when the deeds to him and Bela Cary were given by James Cary, in 1807, and for some years afterward, after speaking of the running out of the lots to Samuel and Bela, of the fence on the south end of the fifty acres and on the south side of the south part thereof, and that those fences were occupied as line fences and kept in repair as such, was asked if he ever heard of more than one line on the west side. This was received, under defendant's objection, and the witness answered, "I never heard of but one line till this last summer." His position being such, that if there had been any difference between the adjoining proprietors in respect to this line, he would have been likely to know it, and the fact that he had heard of none, was some evidence, however slight, that

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none was spoken of or existed, and, hence some evidence of acquiescence in that line.

The plaintiff's surveyor was asked by plaintiff's counsel, "Have you made a calculation as to how long the north line must be, assuming the east, south and west lines to be as given in the deed?" Defendant's counsel objected to the question, on the ground that it was speculative and immaterial. The objection was overruled, and defendant excepted. The witness answered as follows: "Computing the latitudes and departures, as given in the deed, there is an error in it. The land cannot be run by the description in the deed, because, in following the courses and distances given in the deed, you will not come out at the place of beginning. Assuming all the other lines to be correct, the north line should be thirty-four rods and twenty links in length." I am inclined to think the answer admissible, as tending to show the uncertainty and ambiguity of the terms of the deed in respect to location, and, in connection with the other evidence in the case, to assist in accounting for the existence and position of the marked line in question.

The same witness was next asked, "How do the lines of this lot and Cary's hold out? do they overrun or fall short?" This was objected to by defendant's counsel, and received, subject to the objection. The witness went on to state, substantially, that, in measuring the lines given in the two deeds, the actual measurement of every line, where monuments were given, as well as others, overruns the length given in the deed, and stated, with reference to each line, how much.

The deeds were given at the same time, and there is evidence in the case to the effect that the lots were surveyed out to the grantees at the same time. The fact that every line, as given in the deeds, was shorter than an actual survey now made shows it to be, tends to show that the measurement then made was with a longer chain, or measuring line, than the one used in the recent surveys, and that the thirty-two rods then measured ran beyond the termination of that distance now reached, and, hence, tends to account for a contemporaneous line of marked trees being found further west than thirty-two rods, as now measured, from the east line of the fifty acres,

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and to strengthen the evidence of the fact of a practical location of the lots.

I do not see any error calling for a reversal of the judgment, and am of the opinion that it should be affirmed.

All the judges concurred, except HUNT and GROVER, JJ., not voting.

Judgment affirmed, with costs.

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September, 1867.

Affirming 38 How. Pr. 66.

It is a general principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.

An owner of merchandise who by entrusting it to a purchaser on a conditional sale enables the purchaser to ship it and obtain a negotiable bill of lading, loses his title to the merchandise as against a *bona fide* purchaser or pledgee for value of the bill of lading.

The fact that the order by which the seller gives possession to the purchaser under the executory sale contains a clause stating that the merchandise is subject to the seller's order until paid for, does not prevent the title from passing.

Nor does it alter the case that the instrument assigned or pledged as a symbol of the property is not strictly a bill of lading.

The retaking of the merchandise by the seller in *transitu*, from the possession of the carrier, in an action of replevin of which the transferee of the bill of lading had no notice, and the recovery of judgment in favor of the seller, in such action, do not bar the right of the transferee of the bill of lading to maintain an action against the seller for conversion.

Henry Rawls and George S. Seymour sued John G. Deshler, in the Buffalo superior court, to recover the value of a quantity of corn.

On September 18, 1860, one A. L. Griffin, of Buffalo, purchased, or agreed to purchase of the defendant a quantity of white corn. The defendant had the corn on storage at the

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Hatch elevator. He gave Griffin an order on the elevator in these words, dated September 18:

"Deliver A. L. Griffin, Esq., or order 4,328 47-100 bushels white corn, cargo Potomac, subject to my order until paid for.

"JOHN G. DESHLER."

The corn was delivered to Griffin on production of this order, and he, Griffin, shipped the corn on September 18 on board a canal-boat at Buffalo, and received the following bill of lading:

"September 19, 1860.

"Shipped in good order by A. L. Griffin, on board of canal-boat L. B. Trowbridge, B. T. Co. Line. ———, *Master*, the following articles to be carried under deck and delivered in like good order as addressed, without delay, towing day and night, damage and deficiency to be deducted from charges by consignors.

"Account A. L. Griffin, or order, 4328 47-100 bushels of white corn.

"Care of Rawls & Seymour, New York.

"Freight to New York 14½ cents per bushel, free of light-
erage. Consignees paying towing. [Signature.]

"Entered September 21, 1860, S.

Indorsed, "A. L. GRIFFIN."

It appeared that Van Buren had an office in Buffalo and carried on business there under the name of The Buffalo Transportation Company. That Van Buren was a public carrier and had a regular line and had an interest in some of the boats, he was what they call a scalper, he gets a cargo from the owner, and gets a boat to take it and receives a commission from the boats. That Noble was the agent of the company and had authority to sign the bill of lading. On September 19, 1860, Griffin advised the plaintiffs of the shipment of corn to them, and that he had drawn on them for the corn. This letter the plaintiffs received in New York, on the morning of September 20. On September 19, 1860, Griffin drew a draft upon the plaintiffs for two thousand one hundred and twenty dollars, and annexed thereto the bill of lading signed by Van Buren, and on that day procured the said draft to be dis-

counted by the White Bank in Buffalo, and received the avails thereof. This draft was presented to the plaintiffs for acceptance in the city of New York with the bill of lading attached, on September 20, by the correspondent of the White Bank, and on the 21st was accepted by the plaintiffs and subsequently paid by them.

The defendant intercepted the boat on which the corn was laden at or near Rochester, while on its transit to the plaintiffs, and through the instrumentality of proceedings in replevin, obtained possession of the corn, and sold and converted the same to his own use. The action of replevin was instituted in the name of this defendant against Griffin and C. H. Wendt, the captain of the boat upon which the corn was laden. Griffin was not served with any process in the case, and Wendt, upon whom the summons was served, made default, and judgment passed against him accordingly.

The plaintiffs now bring this action, claiming to be the *bona fide* owners of said corn, to recover the value thereof. On the trial in the Buffalo superior court, the jury were directed by the judge to render a verdict for the plaintiffs.

The superior court held that Griffin had the right of property as well as the possession, for by the contract between defendant and Griffin and the delivery on defendant's order the property passed to Griffin, and that the words "subject to my order" merely reserved a lien, and were not equivalent to saying that the title was not to pass. That a sufficient delivery to the plaintiff was made, for the instrument which Van Buren gave to Griffin, although not strictly a bill of lading, was such a symbol as that its delivery was equivalent to an actual delivery of the corn. They also held that the recovery in the action between defendant as plaintiff and Wendt as defendant was not a bar to this action. Reported in 28 *How. Pr.* 66.

Defendant appealed to this court.

John Ganson, for defendant, appellant; — Cited *Blossom v. Griffin*, 13 *N. Y.* (3 *Kern.*) 569; *Herring v. Hoppock*, 15 *N. Y.* 409; *Morris v. Rexford*, 18 *Id.* 552; *Strong v. Taylor*, 2 *Hill*, 326; *Smith v. Lynes*, 5 *N. Y.* (1 *Seld.*) 41; *Covill v. Hill*, 4

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Den. 323; 6 *N. Y.* (2 *Seld.*) 374; *The Freeman v. Buckingham*, 18 *How. U. S.* 182.

H. C. Day, for plaintiff, respondent;—Cited *Terry v. Wheeler*, 25 *N. Y.* 520, 524; *Greaves v. Hepke*, 2 *Barn. & A.* 130; 4 *E. C. L.* 433; *Blossom v. Griffin*, 13 *N. Y.* (3 *Kern.*) 569; 1 *Greenl. Ev.* § 277; *Waldron v. Willard*, 17 *N. Y.* 466; *Calais St. Bt. Co. v. Scudder*, 2 *Black U. S.* 372; *Smith v. Lynes*, 5 *N. Y.* (1 *Seld.*) 41–48, citing *Haggerty v. Palmer*, 6 *Johns. Ch.* 437; *Keeler v. Field*, 1 *Paige*, 312; *Hollingsworth v. Napier*, 3 *Cai.* 182; * *Durbrow v. McDonald*, 5 *Bosw.* 130; † *Fleeman v. McKean*, 25 *Barb.* 474–484; *Wait v. Green*, 35 *Id.* 585; ‡ affirmed in 36 *N. Y.* 556; *Western Trans. Co. v. Marshall*, 37 *Id.* 509; § *Saltus v. Everett*, 20 *Wend.* 267, where *Pickering v. Busk*, 15 *East*, 44, is cited; *Steelyards v. Singer*, 2 *Hill.* 96, ¶ and cases cited; *Keyser v. Harbeck*, 3 *Duer*, 373, 391; *Stevens v. Hyde*, 32 *Barb.* 171; *Fassett v. Smith*, 23 *N. Y.* 252; *Dows v. Greene*, 16 *Barb.* 72; 32 *Id.* 490; affirmed in 24 *N. Y.* 638; *Dows v. Rush*, 28 *Barb.* 157, 183, and cases cited; *Grove v. Brien*, 8 *How. U. S.* 429; *Wolfe v. Myers*, 3 *Sandf.* 7; *Evans v. Nichol*, 3 *Mann. & G.* 614; 42 *E. C. L.* 321; 1 *Pars. Maritime L.* 134; *Dickerson v. Seelye*, 12 *Barb.* 99; *Fenn v. Simpson*, 4 *E. D. Smith*, 276; *Smith Merc. L.* 273; *Place v. Union Ex. Co.*, 2 *Hill.* 19–26; *Powers v. Davenport*, 7 *Black.* 497; *Angel on Carr.* § 70; 1 *Smith Lead. Cas.* 230, notes to *Coggs v. Barnard*; *Hersfield v. Adams*, 19 *Barb.* 577; *Sherman v. Wells*, 28 *Id.* 403; *Russell v. Livingston*, 19 *Id.* 346–352; ¶ *Sweet v. Barney*, 23 *N. Y.* 335; *Moore v. Evans*, 14 *Barb.* 524; *Foy v. Troy & Boston R. R. Co.*, 24 *Id.* 382; *Schroeder v. Hudson River R. R. Co.*, 5

* As to delivery, compare 1 *N. Y.* (1 *Const.*) 261–270.

† See a further decision in 89 *N. Y.* 233.

‡ See another opinion, in 62 *Barb.* 341.

§ Affirmed in this court, and reported in this series.

¶ See also 35 *Barb.* 585. Said to be unsound and unsupported by authority, in *Ballard v. Burgett*, 47 *Id.* 646, and the latter case affirmed in 40 *N. Y.* 314.

¶¶ Reversed, on the ground that the agent in such case does not cease to be the agent of the carrier, in 16 *N. Y.* 515.

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Duer, 55; *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 *N. Y.* (4 *Seld.*) 37; *Fitzhugh v. Wiman*, 9 *N. Y.* (5 *Seld.*) 559; *Bank of Rochester v. Jones*, 4 *N. Y.* (4 *Comst.*) 497; *Oneida Bank v. Ontario Bank*, 21 *N. Y.* 490-499; *Williams on Personal Prop.* p. 83, 2 Am. ed.; *Zachrisson v. Ahman*, 2 *Sandf.* 68;* *Allen v. Williams*, 12 *Pick.* 297; *Rowley v. Bigelow*, 12 *Id.* 307; *Wardwell v. Patrick*, 1 *Bosw.* 406; *Bryan v. Nix*, 4 *M. & W.* 789; *De Wolf v. Gardner*, 12 *Cush. (Mass.)* 19; *Grosvenor v. Phillips*, 2 *Hill*, 147; *Gibson v. Stevens*, 8 *How. U. S.* 384; *Hatch v. Lincoln*, 12 *Cush.* 31, 34, and cases cited; *Allen v. Williams*, 12 *Pick.* 297; *Dows v. Dennistoun*, 28 *Barb.* 393; *De Wolf v. Harris*, 4 *Mason*, 515; *Stevens v. Boston & W. R. R. Co.*, 8 *Gray*, 262; *Sess. L.* 1830, c. 179, p. 204, §§ 1, 2; 3 *R. S.* 76, 5 ed.; *Spencer v. McGowen*, 13 *Wend.* 256; *Shipman v. Clark*, 4 *Den.* 446; *Castle v. Noyes*, 14 *N. Y.* (4 *Kern.*) 329.

BY THE COURT.—DAVIES, Ch. J. [After stating the facts.]—It may be conceded that as between Griffin and the defendant the title to the corn did not pass to Griffin until the same was paid for. Notwithstanding this, the defendant intrusted Griffin with the possession and control of the property. There is some evidence tending to show that the sale was in fact a sale upon credit, and that both parties understood that the money to pay the purchase price was to be raised by a shipment of the corn by Griffin, and the discount of a draft drawn on the faith of the bill of lading thereof. The defendant himself testified on the trial: "It happens very often on the dock that purchasers buy grain and get the bill of lading and raise money on it to pay the purchase price"; that witness "knew Mr. Griffin did that business." Taking the most favorable view of the facts for the defendant, both he and the plaintiffs are innocent sufferers from the fraud or defalcation of Griffin; assuming they both occupy that position, which should suffer for his acts? The rule on this subject was clearly enunciated by Justice ASHURST in *Lickbarrow v. Mason*, 2 *T. R.* 63, and has been universally recognized and followed since: "When-

* Commented on in 2 *Bosw.* 438.

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ever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it."

Applying this doctrine to the present case, we have no difficulty in saying the defendant must sustain the loss occasioned by the acts of Griffin, and not the plaintiffs. The defendant intrusted Griffin with the corn and gave him the *indicia* of title. He was therefore enabled to deal with it as his own. He shipped it in the usual course consigned to the plaintiffs, received a bill of lading therefor, which was negotiable, and did negotiate it, and the plaintiffs became the owners and holders thereof in good faith and for a valuable consideration. Such negotiation of the bill of lading and transfer thereof to these plaintiffs, constituted them *bona fide* holders and owners of the corn, and the defendant's right of stoppage *in transitu* for the purchase money was cut off and terminated. *Lickbarrow v. Mason, supra*; *Hollbrook v. Vose*, 4 *Com. Law Rep. N. S.* notes 9 and 10, and cases there cited.

It is difficult to withdraw this case from the doctrine of *Hollingsworth v. Napier*, 3 *Cai.* 182, and the leading and controlling facts in each are nearly identical. *Napier* sold to one *Kinworthy*, from whom the plaintiff derived title, ten bales of cotton, under the following circumstances:

The cotton was lying in the public store at the quarantine ground at Staten Island, and the defendant sold it to *Kinworthy* in the city of New York, "*for cash payable on delivery.*" Defendant made out a bill of parcels for the cotton, marked in the margin "*cash,*" but containing no receipt for the money. This, together with an order on the storekeeper for the cotton, had, either by the defendant or his clerks, been delivered to *Kinworthy*. He, without either paying for the articles or having taken possession of them, met the plaintiff at a public house, and producing the bill of parcels and order, offered them for sale at the same price for which they had been bought, alleging as a reason that he had been pushed for money. The plaintiff, on this, agreed to become the purchaser, received the bill of parcels and order, and paid for the goods by giving part in cash, and the balance in a check of a third party. Having made the purchase, the plaintiff went to the quarantine ground

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the next day, but at so late an hour, that in the usual course, it was impossible to have the goods shipped that night, and producing the order demanded the cotton, on the turning out of which to him, he paid the amount of the storage, had the bales marked with the initials of his name, and then returned them into the store. The morning after this the defendant went to the quarantine ground, took the cotton and sold it, and the plaintiff brought trover to recover for the value of his cotton thus converted. The plaintiff had a verdict, and the supreme court refused to grant a new trial.

The principles settled in the case of *Bank of Rochester v. Jones*, 4 *N. Y.* 497, would seem to be decisive of the present case. In July, 1843, Foster applied to the bank to borrow nine hundred and fifty dollars for the purpose of buying two hundred barrels of flour of W. Ely. The cashier refused to make the loan without security. Foster proposed to procure the forwarder's receipt for the two hundred barrels of flour to be purchased with the money received from the bank on the loan, and to leave such receipts with the bank as security for the acceptance of the draft to be drawn on the defendant. Foster delivered the draft and forwarder's receipt to the cashier, and the bank discounted the draft. The bank forwarded the draft with the receipt attached, to their collecting agent at Albany, to be presented to the drawee, Jones, for acceptance. Jones took off the receipt and refused to accept the draft. Jones received the flour and before the commencement of the suit the bank demanded the flour of Jones. The bank recovered; and the following propositions may be considered as settled by this court:

1. The delivery of the carrier's receipt to the bank was a symbolical delivery of the flour.
2. The delivery of the carrier's receipt or bill of lading to the bank for a valuable consideration passed to the bank the legal title to the same.

In the present case, the White Bank had the legal title to this corn, and the plaintiff, by the acceptance and payment of the draft of Griffin, and the delivery and transfer to them, of the bill of lading, succeeded to all the rights of the bank, and the legal title to the flour passed to them.

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It is insisted on the part of the appellant, that the instrument produced was not properly a bill of lading, as it was not signed by the master of the boat.

In *Dows v. Greene*, 32 *Barb.* 490, the bill of lading was signed by the agent of Miles & Walker, who were partners dealing in produce, and agents of a transportation company and members thereof. Bloss obtained the bill of lading in good faith, who transmitted it to one Mack, who obtained from the plaintiffs in that action an advance upon the faith thereof.

The supreme court held that the instrument under which the plaintiffs claim was a bill of lading. If not exactly formal it was substantially such. It did not detract from its force or validity that it purported to be the act of the owners of the goods and also of the carrying vessel, instead of their agent, the master or captain. Not only from its similarity to other bills of lading, has this been argued to possess the character of such a paper, but this very instrument has in several instances been adjudged to be a bill of lading. That question is, therefore, no longer open for discussion. Citing *Dows v. Perrin*, 16 *N. Y.* 325, 328; *Dows v. Greene*, 16 *Barb.* 72; *Dows v. Rush*, 28 *Id.* 157, 183; *Bank of Rochester v. Jones*, 4 *N. Y.* 497, to which may be added *Dows v. Greene*, 24 *Id.* 638.

In this connection the remarks of Baron PARK in *Bryans v. Nix*, 4 *Mees. & W.* 775, 789, are apposite and conclusive. He says: "The true question is, what is the meaning and effect of the two documents by whatever name they are called, coupled with the letter from Tempany of February 2, followed by the acceptance by the plaintiffs of Tempany's draft? It seems to us to be clearly this, that Tempany agrees that the oats therein specified shall be held from that time by the boat master for the plaintiffs in their own right, provided they accept the bill as a security for its payment, that the master agrees so to hold them, and that, by the plaintiffs' assent and acceptance of the bill, the constitutional agreements become absolute. The transaction is, in effect, the same as if Tempany had deposited the goods with a stake-holder, who had assented to hold them for the plaintiffs in order to indemnify them. As evidence of such a transaction, it is wholly immaterial whether the instru-

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ments are bills of lading or not; and it might equally be proved through the medium of carriers or wharfingers' receipts or any other description or document, or by correspondence alone. If the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship master employed by the consignor, or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough, and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." In *De Wolf v. Gardner*, 12 *Cush.* 19, SHAW, Ch. J., cites this case with approval.

It seems to me that the principles settled in the case of *Davis v. Greene*, and affirmed in this court, establish the plaintiffs' right to recover.

In *Crocker v. Crocker*, 31 *N. Y.* 507, this court held that when a plaintiff, by his own voluntary act, has, through misplaced confidence, conferred the apparent right of property in bank stock upon a third party, a *bona fide* purchaser of such stock from such party will be protected against any secret trust in favor of the plaintiff. In that case, a learned judge of this court said: "The plaintiff had, by his own voluntary act, caused Stephen Crocker to be invested with the legal title to the stock, and suffered him to deal with it as his own for years. Having through misplaced confidence conferred upon him the apparent right of property as owner, a *bona fide* purchaser of the stock from him, in the course of commercial dealing, without notice, would be protected in his title against any latent equities of the plaintiff. Foster & Livingston, and Skinner & Co., lent their notes and acceptances to Stephen Crocker, on the credit of the stock transferred to them, without notice of the secret trust in favor of the plaintiff, and were *bona fide* purchasers; for the term "purchaser," in this connection, includes one who advances or incurs responsibility upon credit of property. In *Wait v. Green*, 36 *N. Y.* 556, a Mrs. Cornins owned a house, and sold it to one Billington, and delivered the

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same to him, taking his note for the amount of the purchase, with a memorandum at the foot of it, "that the title to the house was to remain in Mrs. Cornins until the note was paid." Billington sold the house to the defendant, for value and without notice, and he was a *bona fide* purchaser. Mrs. Cornins sold the note to the plaintiff, and the same not being paid at maturity, he demanded the house of the defendant, and on refusal brought his action to recover the value of the house. This court held that the defendant had acquired a good title to the house, and that the plaintiff could not recover.

If there could be any doubt on this point, I am unable to see why section 1 of the factors' act does not meet this precise case. *L. 1830, c. 179, p. 203.* It is as follows: "Sec. 1. After this act shall take effect, every person in whose name any merchandise shall be shipped, shall be deemed the true owner, so far as to entitle the consignee of such merchandise to a lien thereon. First, for any money advanced or negotiable security given by such consignee, to or for the use of the person in whose name the shipment shall have been made." Now, in the case at bar, all these requirements are combined.

1. There was a shipment of merchandise, in the name of Griffin, consigned to these plaintiffs.

2. The statute declares in such an event he, the shipper, is to be deemed the true owner of such merchandise.

3. These plaintiffs advanced the amount of this draft to and for the use of Griffin, in whose name the shipment was made, and they have, therefore, a lien upon such merchandise for the money so advanced.

These plaintiffs had no notice by the bill of lading or otherwise, at or before the said advance of money, that the person in whose name the shipment was made, was not the actual and *bona fide* owner of said merchandise.

The lien was not divested or impaired by the action of the defendant in taking the corn from the canal-boat, by the instrumentality of an action of replevin, or by the proceedings in that action. They were *res inter alios acta* and not affecting the rights of these plaintiffs.

The judgment of the superior court of Buffalo was correct, and should be affirmed, with costs.

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Read v. City of Buffalo.

All the judges concurred, except GROVER, J., who was for reversal, and J. M. PARKER, J., not voting.

Judgment affirmed, with costs.

READ v. CITY OF BUFFALO.

September, 1867.

A judgment rendered by a justice of the peace, while holding over after his term of office had expired, but before that of his successor commenced, cannot be impeached collaterally. The office is continuing in its nature, and as he was in undisputed possession under apparent authority of law, his title can only be questioned in a proceeding directly involving that issue.

Elizabeth Read sued the city of Buffalo, in the Buffalo superior court, on a judgment which she had recovered in a justice's court of that city held by one Albert S. Merrill, a justice of the peace.

The defense was that Merrill was not a justice of the peace at the time the judgment was rendered.

The judge before whom the present action was tried, found that Merrill was elected for four years, beginning January 1852, and duly entered on the office, his term expiring December 31, 1855. His successor, elected in November, 1855, did not qualify until January 7, 1856, by reason of a change in the charter made in 1853, which made his term commence on that day.

Plaintiff's former action was commenced before Justice Merrill during his term, and was on trial in December, 1855, and was then adjourned, by consent, to January 2, 1856, when defendants failed to appear. Justice Merrill, notwithstanding the expiration of his term, took the remaining testimony of the plaintiff, and gave judgment in her favor.

The superior court held, that although there was some doubt whether Merrill was an officer *de jure*, he was acting such *de facto*, until the day when his successor could and did qualify. They accordingly reversed the judgment of the spe-

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cial term, by which plaintiff had been nonsuited. Defendant appealed to this court.

George S. Wardwell, for defendant, appellant;—Cited *L.* 1843, p. 118; 1 *R. S.* 5 ed. pp. 401, 402, §§ 90, 93, 98; *Const.* art. 10, § 2; *People v. Garey*, 6 *Cow.* 642; *People v. Tieman*, 30 *Barb.* 197; *S. C.*, 8 *Abb. Pr.* 359; 1 *R. S.* 5 ed. § 14, tit. 6, c. 5, p. 409; *Id.* 2 ed. p. 85; *L.* 1853, p. 452, c. 230, tit. 2, § 2.

Wm. H. Greene, for plaintiff, respondent;—Cited *L.* 1843, p. 118, §§ 2, 12; 1 *R. S.* p. 111, § 71; p. 116, § 3; p. 120, § 32, art. 3, c. 5; *L.* 1845, p. 190, § 34.

BY THE COURT.—PORTER, J.—As the law stood when Merrill was elected, his term of office extended to the first day of January, 1856. In the amended charter of the city of Buffalo, which was adopted in 1853, the legislature designated the first Monday of January, as that on which, thereafter, the terms of justices and other city officers should commence. Under this provision, the justice assumed that his time did not expire until the commencement of the term of his successor in office; and he accordingly continued to discharge his duties as a magistrate until he was succeeded by the new incumbent, on the first Monday of January. The theory of the defendant is that his term expired on the last day of December, and that the effect of the change in the charter was to produce an interregnum of a week, during which, so far as this office was concerned, the administration of justice in the city of Buffalo was suspended.

It is unnecessary to determine the question whether the magistrate was right in retaining his place until the qualification of his successor. It is sufficient that he was an officer *de facto*, discharging the duties of his position under color of legal title. His judicial acts, so far as they affected only the rights of third persons, were not subject to collateral impeachment on the ground that he was no longer a magistrate *de jure*. The office was continuing in its nature, and as he was in undisputed possession under apparent authority of law, his title could only be questioned in a proceeding directly involving that issue. The rule

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on this subject is founded on considerations of public policy, and its maintenance is essential to the preservation of order, the security of private rights and the due enforcement of the laws. *Parker v. Baker*, 8 *Paige*, 428; *Weeks v. Ellis*, 2 *Barb.* 320; *Greenleaf v. Low*, 4 *Den.* 168, 170; *Wilcox v. Smith*, 5 *Wend.* 231, 233.

The order granting a new trial should be affirmed, with judgment absolute for the plaintiff.

All the judges concurred, except BOCKES, J., who was absent.

Judgment affirmed, with costs.

REED v. BOARD OF EDUCATION OF CITY OF
BROOKLYN.

December, 1868.

Under a building contract, the owner does not, by taking possession of the building, without complete performance, necessarily waive his right to enforce a forfeiture for a defect in the performance.

George Fred Reed sued the Board of Education of the City of Brooklyn, in the supreme court, for compensation under a special contract for work and materials in erecting a school-house, to be paid for in divers sums as the work should progress, and the last sum to be paid when the work was finished, and approved by a certificate of a committee. The whole contract price was a little less than three thousand dollars, the last payment was to be four hundred and twenty-one dollars. The work was completed, except one sink, which was not in accordance with the specifications and not satisfactory to the committee, and it would have cost one hundred dollars to make it conform to the contract, and no certificate was ever obtained from the committee. The referee found these facts, and that the certificate was not unreasonably refused; and as a conclusion of law he found the plaintiff was not entitled to recover.

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The supreme court held, that in the absence of any finding on the point, they must assume that the referee found that the defect was not supplied, and that there was no waiver by the defendants of the defect. Plaintiff appealed.

John Sessions, for plaintiff, appellant;—Cited *Atkins v. Chilsom*, 9 *Metc.* 52; *Ludlow v. N. Y. & H. R. R. Co.*, 12 *Barb.* 440; Lord MANSFIELD, *Gooding v. Daniels*, *Cowp.* 803; see *supra*, 12 *Barb.* 445; *Esmond v. Van Benschoten*, *Id.* 370; *Fleming v. Gilbert*, 3 *Johns.* 528; *Jewell v. Schroepfel*, 4 *Conr.* 564; *Vanderbilt v. Eagle Iron works*, 25 *Wend.* 665; *Cobb v. Stevens*, 14 *Me.* 572; *Hayward v. Leonard*, 7 *Pick.* 181.

Thos. H. Rodman, for defendants, respondents;—Cited *Durkee v. Mott*, 8 *Barb.* 423; *Woodin v. Foster*, 16 *Id.* 146; *Smith v. Brady*, 17 *N. Y.* 173; *Milner v. Field*, 1 *Eng. L. & Eq.* 177, 531; *Grant v. Morse*, 22 *N. Y.* 323.

BY THE COURT.—PECKHAM, J.—Upon the findings of fact by the referee, there seems to be very little ground for an allegation of error in this case. It is insisted that the building was accepted, even if it were not completed according to the contract. No such fact is found, nor was the referee required so to find. If necessary to support the judgment, we are probably bound to presume that he found the other way, in accordance with his judgment. *Grant v. Morse*, 22 *N. Y.* 323.

If the contractor has neglected, and refuses, to complete his contract in a material point, it does not follow that the owner waives its performance by taking possession of, and occupying, the building, in its defective condition. An owner is not put to so absurd an alternative as either to lose and abandon his building, worth, perhaps, ten thousand dollars, or to occupy it at the peril of paying for work not performed, or of waiving thereby the performance of any substantial covenant of the contractor.

Upon the case as presented here, there seems no ground for relief, even though the referee erred in his finding of facts. For an error of that character, as a general rule, the appeal is confined to the supreme court.

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This includes, also, the finding in regard to the extra work. If the supreme court committed any error, it was not one within the province of this court to correct.

The judgment must, therefore, be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

REED v. STRYKER.

December, 1858.

Reversing 6 *Abb. Pr.* 109.

A creditors' action, by several judgment creditors, seeking to set aside several fraudulent conveyances made by the debtor, at various times and to various persons, and to subject the property to the executions of the plaintiffs, and to render an assignee in trust personally liable,—states but one cause of action; and the various transferees may be joined as defendants, although there was no privity between the transferees.*

Colba Reed, Borut Richtmyre, De Witt C. Stryker, John M. Brandred, Elizabeth Boughton and Elisha Hammond, brought this action, in the supreme court, against Peter M. Stryker and Catharine M., his wife, Sabina Stryker, and George Manning, to set aside fraudulent conveyances made by the debtor of the plaintiffs, Peter M. Stryker.

The complaint alleged several judgments recovered by the several plaintiffs, at various times and in various sums, against Peter M., for debts or considerations which arose prior to 1841, and it also alleged the issue of execution, &c.; and it sought to set aside as fraudulent as against creditors the following transfers made by Peter M., viz: a transfer of property to his wife, three others, made at various times, to his mother Sabina Stryker, and a general assignment for benefit of creditors, to the defendant Manning; and it also alleged that Manning had violated his trust, under the assignment, whereby he

* Followed in *Newbould v. Warrin*, 14 *Abb. Pr.* 80.

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had become personally liable for the payment of several claims of the plaintiffs.

Manning demurred, on the ground that several causes of action were improperly united; that the matters relating to the assignment to Manning were separate from the others; and that he had no connection with the others.

The supreme court, at general term, on appeal from an order of the special term overruling the demurrer, held that as the complaint did not allege combination, confederacy or concert of action between the various transferees, there was no joint liability, and the causes of action were several. They accordingly reversed the order. Reported in 6 *Abb. Pr.* 109.

Plaintiff appealed.

Abraham Becker, for plaintiffs, appellants.—The demurrer admits all the facts as stated in the complaint. *Story Eq. Plead.* § 452, note 4. It was competent and proper for the plaintiffs, separate judgment creditors of Peter M. Stryker, all to join in this suit, an execution upon each judgment having been returned unsatisfied, to reach all the legal and equitable property of the debtor. 2 *R. S.* 4 ed. p. 353, §§ 42, 43; *Id.* p. 974, § 11; *Boyd v. Hoyt*, 5 *Paige Ch.* 77; 1 *Id.* 637; 1 *Barb. Ch.* 59; 20 *Barb.* 380; 1 *Code R.* 19; 2 *Sandf.* 636; 7 *How. Pr.* 187; 15 *Id.* 333.

S. L. Manning, for Manning, defendant, respondent.—The several causes of action do not affect all the parties to the action. *Code of Pro.* § 167. No cause of action is alleged in which defendants have a common interest. *Dewey v. Ward*, 12 *How. Pr.* 419; *Boyd v. Hoyt*, 5 *Paige*, 65; *Lexington, &c. R. R. Co. v. Goodman*, 5 *Abb. Pr.* 493; 15 *How. Pr.* 85. The causes of action against the defendant Manning are of a *different nature* (see *Fellows v. Fellows*, 4 *Cow.* 682), and are inconsistent with each other. *Burr. on Assign.* 536; *Bishop v. Houghton*, 1 *E. D. Smith*, 566. And see *Maxwell v. Farnam*, 7 *How. Pr.* 236; *Dorman v. Kellam*, 4 *Abb. Pr.* 203; *Sweet v. Ingerson*, 12 *How. Pr.* 331; *McIntosh v. McIntosh*, *Id.* 291; *Murray v. Hay*, 1 *Barb. Ch.* 59. The complaint unites causes

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of action against the several defendants, *individually*, with causes of action against Manning, as *trustee*. This cannot be. *Pugsley v. Aiken*, 14 *Barb.* 116; *McMahon v. Alden*, 3 *Abb. Pr.* 689; 12 *How. Pr.* 39; *Landau v. Levy*, 1 *Abb. Pr.* 376; 4 *Johns. Ch.* 199. The several causes of action are not separately stated.

BY THE COURT.—HARRIS, J.—The single question in this case is, whether the complaint contains one or several causes of action. If several, there is a misjoinder, for the several causes do not affect all the defendants.

The plaintiffs severally are the judgment creditors of the defendant, Peter M. Stryker. Their executions are returned unsatisfied. They are still in pursuit of the property of their debtor. They bring this action, alleging that some of the property has been fraudulently conveyed to one of the defendants, some to another, and some to the third. The subject of the action is the debtor's property. The object of the action is to remove the illegal impediments which the defendants have placed in their way, so that the property of the debtor may be applied to the satisfaction of their debts. It is as much a single cause of action, as an action to foreclose a mortgage where persons having various and independent liens upon the mortgaged premises, some on one part, some on another, and still others on the whole, are made defendants. They are in no way connected with each other, but they are each interested in the subject, or object of the action, which is to have the mortgaged premises sold, and the mortgage satisfied out of the proceeds, and because they are thus interested, they are not only proper, but necessary parties to the action. So, here, the plaintiffs seek to have the property which they find in the hands of these defendants,—some in the hands of one, and some in the hands of another,—and which, as they allege, has been fraudulently placed there, applied to the payment of their judgments. Each of the defendants has an interest in the controversy. Each is a necessary party to the complete determination of the questions involved in the action.

The case is not distinguishable from *Fellows v. Fellows*, 4 *Cow.* 682. In that case, a decree in chancery for the payment

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of money had been obtained against John Fellows, upon which an execution had been issued and returned unsatisfied. A bill was then filed against him to obtain satisfaction of the decree, out of his property. His two sons, William and Thomas, and his son-in-law, Roswell Day, were made defendants. It was alleged that the property of John Fellows had been transferred by him without consideration, and fraudulently; a part to his son William, another part to his son Thomas, and another part to his son-in-law Day. Each defendant demurred to the bill, on the ground that he had been impleaded with the other defendants improperly; that the matters set forth in the bill were distinct and independent of each other. The demurrers were overruled by the chancellor, and upon appeal to the court for the correction of errors, after a most laborious discussion, in which the three justices of the supreme court participated, the decision was unanimously affirmed. WOODWORTH, J., said: "The claim against all the defendants is of the same nature. The fraud alleged against them is the same. The question to be decided is in every respect the same. The transfer being fraudulent, the property was not changed by being put into the hands of the defendants. They hold the property of the debtor without title. They are, therefore, necessarily concerned in the thing to be recovered, although they set up distinct interests in separate parcels." SUTHERLAND, J., says: "The general right claimed by the bill is a due application of the property of John Fellows to the payment of the judgment. The subject of the bill and of the relief, and the only matter in litigation, is the fraud charged in the management and disposition of that property, and in which charge all the defendants are implicated, though in different degrees and proportions. The defendants, therefore, have one common interest among them all, centering in the point in issue in the cause; and different matters of different natures are not demanded by the bill. It is one matter—the property of John Fellows—and the point in issue upon which the rights of all the parties must depend is, whether the transfer of that property to his sons and son-in-law was fraudulent or not." And SAVAGE, Ch. J., says: "Each of the defendants separately, we must intend, conspired with John Fellows to defraud the plaintiff by col-

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lectively taking separate parts of the property and holding it for his benefit. There was no privity between William Fellows and Thomas Fellows and Roswell Day; but there was privity between each of them and John Fellows."

The same question was fully considered and discussed by Chancellor KENT, in *Brinckerhoff v. Brown*, 6 *Johns. Ch.* 139. In that case, the bill had much more of the character of multifariousness than the complaint now in hand. There, as in this case, the plaintiffs were distinct and unconnected judgment creditors. The judgments were against a corporation called The Genesee Manufacturing Company. The object of the plaintiffs was to obtain satisfaction of their judgments out of the property of the company, which, as they alleged, had been fraudulently withdrawn from their reach by the defendants. Some of the defendants were trustees of the company, and the bill sought to make them personally liable. Others were stockholders, and the bill sought to have them charged with payment of their unpaid subscriptions. Two of the defendants had purchased personal property belonging to the company. There were numerous other charges against the defendants, in which their co-defendants were not shown to have any concern. There was a demurrer to the bill on the ground that it was multifarious. It was insisted that the matters of the bill were totally distinct and unconnected. The chancellor, after reviewing the facts of the case, proceeds to say that, "it appears from the bill that all the defendants were not jointly concerned in every injurious act charged. There was a series of acts on the part of the persons concerned in the company, all produced by the same fraudulent intent, and terminating in the deception and injury of the plaintiffs. The defendants performed different parts in the same drama. But it was still one piece, one entire performance, marked by different scenes." The demurrer was overruled.

In *Boyd v. Hoyt*, 5 *Paige*, 65, the bill was filed by judgment creditors of Hoyt, after the return of an execution unsatisfied, to reach property in the hands of the other defendants, one of whom was the son, and the other the son-in-law of the debtor, and which it was alleged had been fraudulently transferred to them. It did not appear that the defendants had any joint in-

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terest in the property. On the contrary, it appeared that the property had been received by the son and son-in-law severally, and at different times. Upon demurrer for multifariousness, the chancellor said: "So far as the bill seeks to reach the property of Hoyt, which has come to the hands of the other defendants respectively, without consideration, and to have the same applied to the satisfaction of the balance due upon the plaintiff's judgment, there is no foundation for the objection that it is multifarious." And he added: "I have no doubt that two or more persons holding the property of the judgment debtor under different conveyances, or becoming indebted to him at different times, or for distinct sums, may be joined with him as defendants in creditors' bill." See also *Hammond v. Hudson River Iron & Machine Co.*, 20 *Barb.* 378.

Thus it appears that upon the point under consideration, the tenor of the authorities is uniform and decisive. The object of the suit is single. The plaintiffs, defeated in the collection of their debts by the ordinary process of law, now seek to reach the property of their debtor in the hands of those to whom he has dishonestly conveyed it. However numerous the persons with whom the property has thus been deposited, however distinct the transactions by which the debtor has sought to place it beyond the reach of his creditors, or however widely it may have been scattered in the execution of this purpose, the effort to recover the property and have it applied to the satisfaction of the plaintiffs' debts, embraces but a single cause of action.

The judgment of the supreme court, at general term, should be reversed, and that at the special term affirmed.

Judgment accordingly.

REFORMED PROTESTANT DUTCH CHURCH v.
BROWN.

December, 1861.

Affirming 20 Barb. 326; S. C., 17 How. Pr. 288.

A subscription made at the formation of a religious society, but before its incorporation, for the use and benefit of the society and to carry out

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its objects,—*e. g.*, toward the erection of a building, and to the support of a minister,—is presumed legal, in the absence of evidence to the contrary; and upon the subsequent incorporation of the society, under *L. 1813, c. 60, § 4*, the trustees became vested with the right to collect the subscription.*

The Reformed Protestant Dutch Church of Westfield, in Staten Island, sued Susan D. Brown, as executrix of David Brown, deceased, on the testator's subscription, made on or about February 26, 1849, to pay the sum of five hundred dollars toward building a house of worship for the plaintiffs, and one hundred dollars a year for the support of a minister. The society was not incorporated under the statute (*L. 1813, c. 60*), until September, 1849, or June, 1851; but this action was brought after the latter date and after the incorporation had been perfected and the church had been built.

The question raised by this appeal was whether the corporation could enforce such a subscription, made before its formation.

The supreme court held, that although it did not appear by the evidence that testator promised, after the incorporation, to pay his subscription, it did appear that after the preliminary organization and the execution of articles of association, the testator frequently told those in charge of the erection of the church edifice to go on and finish it, and he would pay his subscription; and that this was a waiver of any conditions in the original subscription, and the fact that the society, on the faith of this, and similar promises from others, went on and finished the building, was a sufficient consideration. That the corporation contemplated by the parties having been subsequently organized, and a part of the work done after its incorporation, they could recover upon the subscription. Reported in 20 *Barb.* 335; S. C., 17 *How. Pr.* 288. Defendant appealed.

BY THE COURT.—LOTT, J. [After observing that the only

* See, beside the cases cited in the opinion, *Wayne & Ontario Inst. v. Greenwood*, 40 *Barb.* 72, and 2 *Abb. Dig.* 2 ed. p. 172, note; *Same v. Blackman*, 48 *N. Y.* 663; *Hutchins v. Smith*, 43 *Barb.* 235.

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question presented by the case was whether the facts found by the referee justified his conclusion of law.]—It appears by the referee's finding, that a religious society was formed on February 26, 1849; that it was subsequently incorporated as a church in due form by the name of The Reformed Protestant Dutch Church of Westfield, Staten Island and that the said corporation is the plaintiff in the action; that David Brown, the testator of defendant, on the day of the formation of the society, promised and agreed, by subscriptions made by him, to give and pay the sum of five hundred dollars towards the erection and building of a church, and the further sum of one hundred dollars a year for the support and maintenance of a minister of the gospel for said church, and that he afterward and after the church building had been nearly completed, again promised and agreed to give and pay the said sums for the objects specified, and expressly waived the operation and force of a clause in an article of agreement, or a statement made and signed on April 9, 1849, in relation to the indebtedness of the church (the nature of which does not, however, appear); that Brown has departed this life, leaving sufficient assets to pay all debts owing by him, and that on or about February 3, 1853, letters testamentary on his estate were granted to the defendant; that the plaintiff's demand, as set forth in the complaint, has been repeatedly presented to her for payment previous to the commencement of this action, and that she has neglected and refused to pay the same.

These are all the facts I deem pertinent or material to the question to be considered by this court. Whether the plaintiffs were incorporated on September 11, 1849, as found and decided by the referee, or on June 31, 1851, when the certificate of incorporation was acknowledged and recorded, as claimed by the counsel of the defendant, is wholly immaterial. They were in fact incorporated long before the commencement of this suit.

The facts above stated do not show, nor is it expressly found by the referee, to or with whom the promise or agreement of Brown was made; but it does appear that it was made at the time of the formation of the society, and that it was made by subscription. It will, therefore, in the absence of an express

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The facts above stated do not show, nor is it expressly found by the referee, to or with whom the promise or agreement of Brown was made; but it does appear that it was made at the time of the formation of the society, and that it was made by subscription. It will, therefore, in the absence of an express

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statement or finding, be presumed on appeal, that it was a legal subscription in and by which he, in some way, legally obligated himself to pay the sums subscribed for the use and benefit of the society, and in carrying out the objects contemplated. This presumption is fully warranted by the rule laid down by this court in *Carman v. Pultz*, 21 N. Y. 547, "that error on the part of the court below will not be presumed, but must be made duly to appear. Hence it is incumbent on the appellant to take care so to present the facts upon which the case depends, as to show affirmatively that an error has been committed. This court will presume nothing in favor of the party alleging the error, but if compelled, through the imperfection of the statement of facts, to resort to presumptions at all, will adopt only such as will sustain the judgments;" and "where, as in this case, there is an evident omission of important facts in the statement or report, we must presume the facts to have been such as would warrant the judgment rendered."

I will only add, that it was not necessary that the promise or agreement should be to or with the plaintiffs in their corporate capacity. The general statute regulating the incorporation of religious societies (*L.* 1813, c. 60; 3 *R. S.* 282), expressly provides by section 4, that the trustees of every church, after it is incorporated, are authorized and empowered to take possession of all the temporalities belonging to the church, or to any other person for its use, and also in its corporate name to sue and recover, hold and enjoy all the debts, demands, rights and privileges belonging thereto, in whatever manner the same may be held, as fully and as amply as if the right or title thereto had originally been vested in the said trustees.

The plaintiffs, therefore, on becoming incorporated, became vested with the right to demand from Brown the amount of his subscription. See *Stanton v. Wilson*, 2 *Hill*, 153; *Hamilton Plank R. Co. v. Rice*, 7 *Barb.* 157, and *Farmington Academy v. Allen*, 14 *Mass.* 172.

There is nothing in the facts disclosed by the referee's decision, which requires or demands the interposition of any technical rule of law to defeat the benevolent or religious intentions of the testator in forwarding the good work and enterprise to which he became a liberal subscriber.

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Those facts, on the contrary, imposed a legal duty, and the referee has properly decided, and his decision and the judgment thereon should be affirmed, with costs.

REYNOLDS v. REYNOLDS.

March, 1867.

Continuance of cohabitation, though it is conclusive evidence of condonation in case of adultery, and bars an action for an absolute divorce on that ground, is not conclusive in the case of an action for limited divorce on the ground of cruelty, &c.

Mabel Reynolds brought this action, in the supreme court, against Schuyler Reynolds, her husband, for a separation from bed and board forever, on the ground of cruel and inhuman treatment. Defendant's answer denied the cruel and inhuman treatment alleged in the complaint; and set up that after the alleged committal of the several acts complained of, the plaintiff had, from October, 1857, to April, 1858, continued voluntarily to cohabit with him.

The referee found that the defendant had been guilty of cruel and inhuman treatment of the plaintiff, and of such conduct toward her as to render it unsafe and improper for her to cohabit with him, and that said treatment and conduct had not been condoned or forgiven by the plaintiff, and that the plaintiff was entitled to judgment decreeing that the plaintiff and defendant be separated from bed and board forever.

The supreme court, at general term, in an opinion by DAVIS, J., held that cohabitation was not conclusive evidence of condonation of cruelty. As to the facts in this case, the opinion of the learned judge was as follows:

The defendant, on the issue of condonation in this case, held the affirmative. It was for him to establish satisfactorily to the referee that his cruelty and personal violence to plaintiff had been forgiven by plaintiff. The evidence he gave on that subject was that plaintiff continued to live and cohabit with him, after his last act of personal violence on October 5, 1857,

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to April 23, 1858, and that she left on the last named day without any further acts of violence having occurred. If the case stood upon this evidence, I should be of the opinion that the referee ought to have found a condonation. But, "if condonation may be inferred from cohabitation, it may be rebutted by the accompanying circumstances" (per PARKER, J., 4 *Barb.* 221); and in this case those circumstances were quite sufficient, in my opinion, to effect that result. The case shows that, for twenty years, the defendant had, at various times, been guilty of brutal violence towards the plaintiff, of which she might well expect future repetitions; that at the time of his last acts of violence she declared her intention to submit to it no longer; that she had no relatives or friends, within a reasonable distance, to whom she could resort for shelter and protection; that she was destitute of money, and, of course, without means to defray the expenses of a journey to them; that she had no suitable clothing for traveling, and scarcely sufficient for ordinary decency; that she did endeavor, shortly after October 5, to procure a place where she could support herself by her labor; that during this period her husband, though a wealthy man, refused to furnish her money to buy necessary wearing apparel, compelling her to wear shoes made and patched by herself, for the want of means to procure others; and that as soon as her brother residing at Brooklyn was in a condition to receive her, she went to him, and has remained ever since, living apart from the defendant; and these are circumstances which the referee had a right to consider as rebutting the effect of the fact of her living and cohabiting with defendant after his last outrage upon her person.

I think it is quite impossible for us to say that the referee had no right, upon the evidence, to come to the conclusion that he did, or that his conclusion was against its clear weight.

It has been held in some of the States, that subsequent cohabitation is not evidence of condonation of previous cruelty (*Perkins v. Perkins*, 6 *Mass.* 89; *Hollister v. Hollister*, 6 *Barr*, 447); but I am inclined to think that it is evidence tending to establish that fact, and which, wholly unexplained, may be sufficient for the purpose.

Rice v. Isham.

George W. Bowen, attorney for plaintiff, respondent;—Cited *Smith v. Smith*, 4 *Paige*, 432; 2 *R. S.* 145, § 42, subd. 2; *Whispell v. Whispell*, 4 *Barb.* 221; *Perkins v. Perkins*, 6 *Mass.* 69; *Hollester v. Hollester*, 6 *Barr*, 447; *Johnson v. Johnson*, 14 *Wend.* 643-4;* *Burr v. Burr*, 10 *Paige*, 20;† *Forrest v. Forrest*, 25 *N. Y.* 501.

Ely & Farnell, attorneys for defendant, appellant.

BY THE COURT.—J. M. PARKER, J. [After stating the facts.]—The findings of the referee are fully warranted by the evidence, of specific acts of cruelty and inhuman treatment, and of the circumstances under which the plaintiff continued to cohabit with the defendant after the last act of cruelty proved. Such continuance is not, in this case, as it would have been in an action for divorce on the ground of adultery, conclusive of the fact of condonation. In that case the statute makes it so, but not in this. 2 *R. S.* 145, § 42; *Johnson v. Johnson*, 4 *Paige*, 460; *Same v. Same*, 14 *Wend.* 637; *Whispell v. Whispell*, 4 *Barb.* 217; 2 *R. S.* 147. As the case stands here, therefore, the conclusion of the referee that the plaintiff is entitled to judgment is unimpeachable.

[Remarks as to abandoned exceptions are omitted here.]

The judgment appealed from is right and should be affirmed with costs, and an award of ten per cent. upon the amount of the judgment as damages for the delay produced by the appeal.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages.

RICE v. ISHAM.

September, 1863.

This court will not reverse a judgment on the report of a referee, unless

* Reversing 4 *Paige*, 460, and the latter case reversing 1 *Edw.* 459.

† Affirmed in 7 *Hill*, 207.

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the findings of fact show affirmatively the error on which the appellant relies.*

Defendant adopted a corporate name in which to carry on business, and authorized an agent to draw bills on his factor, and subsequently transferred the business to a company organized under that name. *Held*, that he was liable to the factor for money paid on bills drawn in the same name, by the agent, after the transfer, and paid in good faith, and without notice of the transfer.

Where it is the usual course of business for a factor to accept bills drawn by his principal and return them to him, to be used for raising money as he pleases, the factor's possession of such bills bearing the blank indorsement of the principal is sufficient *prima facie* evidence of ownership to enable the factor to recover from the principal the money paid thereon at maturity, in the absence of proof of an unlawful diversion.

A creditor does not exonerate his debtor by agreeing with a third party who assumes payment of the debt, to receive payment from the latter in negotiable paper, if the agreement is never carried into effect. Giving credit in account for such paper, under a mistake, is not conclusive on this question.

One standing in the position of a surety is not exonerated by an agreement of the creditor to give time to the principal debtor, if the agreement was made with the consent of the former.

Henry G. Rice and others sued Ralph H. Isham, for money paid. The action was in the nature of assumpsit for money paid to the defendant's use at his request, and was brought in the New York common pleas, to recover an alleged balance of three thousand seven hundred and seventy-two dollars and nine cents, claimed to be due to the plaintiffs, for advances as the factors of the defendant, who was a manufacturer of felt goods at Glenville, in Connecticut, the plaintiffs carrying on their business at the city of Baltimore. The facts, as found by the referee before whom the case was tried, were as follows: In February, 1852, an arrangement was entered into between the parties by mutual letters passing between them to the effect that the defendant should make consignments of his goods to the plaintiffs for sale on commission, and

* By the amendment of section 268 in 1869, it is not necessary to insert the findings, &c., at large, in the case, but it is enough that they appear in the judgment roll. It had been otherwise held in *Philbin v. Patrick*, *March*, 1868. See also *Wiltzie v. Eaddie*.

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that the plaintiffs should accept the defendant's bills at six months for two-thirds of the market value of the goods. During the course of the dealings which ensued, the individuals of the firm of the factors was changed by the retirement of one of the partners and the taking in of a new partner; but after the close of the transactions the out-going partner assigned his interest in the claim against the defendant to the plaintiffs, and no point is now made upon the question of parties. Business of the character contemplated was commenced and carried on down to and including June 17, 1854, one Whittall acting as the agent of the defendant, he having been named by the defendant to the plaintiffs as the person who, on behalf of the defendant, would forward the goods and draw the drafts. Eight several consignments of goods were made to the plaintiffs, the last of which was forwarded January 21, 1854. The defendant drew a large number of bills on the plaintiffs, the last of which was dated June 17, 1854. These were drawn by Whittall as agent, to the order of, and were indorsed by, the defendant, and they were payable six months after date. They were accepted and paid at maturity by the plaintiffs, the drawees. The goods consigned were, after considerable delay, finally sold; and, after crediting the proceeds, there remained a balance due from the defendant to the plaintiffs on February 20, 1856, of the amount above mentioned.

The defense set up arose in part out of an alleged change in the proprietorship of the manufacturing business, by means of which, as the defendant insisted, the liability for the advances, or a portion of them, had devolved upon an association or corporation which had succeeded to the business of manufacturing the felt goods, and which had taken the place of the defendant in the dealings with the plaintiffs. On that subject the referee found that the manufacturing business was carried on in the name of the defendant until the month of December, 1853, when, for reasons of convenience and advantage to himself, the name of "The Glenville Woolen Company" was used by him, but without any change of interest; and that on May 25, 1854, a preliminary meeting for the organization of a company under the laws of Connecticut was held, and that on

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the next day a second meeting was held; but that the plaintiffs had no notice of such movements until on or about July 13, 1854; that said company was not completely organized, or authorized to commence business until December 13 in that year; that the plaintiffs had never received any notice forbidding them to pay their acceptances, that they had not received any consideration for discharging the defendant from his liability, nor had ever agreed to discharge him or to accept the corporation as their debtor instead of the defendant. The referee accordingly reported that in point of law the plaintiffs were entitled to recover the above mentioned balance with interest; and judgment was rendered accordingly, which was affirmed at a general term.

I. T. Williams, for defendant, appellant.

J. H. Reynolds, for plaintiffs, respondents.

BY THE COURT.—DENIO, Ch. J. [After stating the facts.]—Upon this statement of facts, it is difficult to see how any question of law can arise. *Prima facie*, it is an ordinary case between factor and principal, where the factor has advanced in excess of the proceeds of goods placed in his hands to be sold. It is very familiar law, that in such cases an action of assumption, upon the implied contract, arises in favor of the factor, to recover the balance against the principal. Accordingly, the trial and the argument of the defendant's counsel bring forward a variety of facts found in the testimony, which, as it is alleged, show that the referee arrived at incorrect conclusions of fact upon the evidence. Twelve of the fourteen exceptions to the report, are based upon an alleged want of evidence to sustain his conclusions. The thirteenth claims that certain facts should have been found, which are not found, and the last is a general exception to all their conclusions of law and fact. The statements of facts found contained in the case were made in pursuance of an express provision of the Code of Procedure (§ 272); and it is furthermore explicitly provided, that although questions of law, arising upon trials before a judge without a jury, and before a referee, may be reviewed upon every stage of the appeal, the questions of fact are open

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to examination only upon an appeal to the general term of the court in which the trial took place. §§ 268, 272. Plain as this seems to be, upon the language of the statute, it has frequently been found necessary to re-assert it, and the decisions have been uniform and consistent. *Davis v. Allen*, 3 *N. Y.* 168; *Esterly v. Cole*, *Id.* 502; *Borst v. Spelman*, 4 *Id.* 284; *Western v. Genesee Mutual Ins. Co.*, 12 *Id.* 258; *Dunham v. Watkins*, *Id.* 556; *Griscom v. Mayor of N. Y.*, *Id.* 586; *Hunt v. Bloomer*, 13 *Id.* 341; *Johnson v. Whitlock*, *Id.* 344; *Magie v. Baker*, 14 *Id.* 435; *Smith v. Grant*, 15 *Id.* 590; *Turner v. Haight*, 16 *Id.* 465; *Otis v. Spencer*, *Id.* 610; *Griffin v. Marquardt*, 17 *Id.* 28; *Viele v. Troy & Boston R. R. Co.*, 20 *Id.* 184; *Carman v. Pultz*, 21 *Id.* 547; *Grant v. Morse*, 22 *Id.* 323. Some of these cases, and especially the one last noted, show that it is the duty of the party who designs to appeal to this court, to procure such a finding of the facts, as to show affirmatively the error upon which he relies. If it cannot be made out, from the findings, whether the judgment is right or wrong, it will be assumed to be correct, and will accordingly be affirmed; in other words, the judgment must appear to be erroneous by applying the conclusions of law, or the general judgment pronounced, to the conclusion of facts stated in the findings, or the appellant cannot ask for a reversal. But, as has been said, the facts found in the present case fully sustain the judgment given, and it must, therefore, be affirmed.

It sometimes happens that by an inadvertence of counsel the facts are presented in such a manner that it is impossible, without violating well-settled rules of practice, to do justice between the parties. In such cases it is in our power to suspend the judgment here, in order to enable the party whose rights might otherwise suffer, to apply to the court from whose judgment the appeal was taken, for a re-settlement of the case. It having been very earnestly insisted in this case that, if the facts could be examined, without prejudice from the findings of the referee, it would appear that the judgment was manifestly wrong, I have looked into the testimony with a view to the exercise of the jurisdiction referred to, if it could be invoked.

It is contended that the defendant ought not to be charged

with two of the drafts which were drawn upon, and accepted and paid by, the plaintiffs, because, as it is said, they were drawn after the defendant had disposed of his interest in the manufacturing business. They were dated respectively May 27 and June 17, 1854, for eight hundred dollars and seven hundred dollars, by Whittal, as agent, and were in no manner distinguishable in form, or otherwise, from those which he had been accustomed to draw when the defendant was confessedly carrying on the business under the name of The Glenville Woolen Company. Conceding that the transfer of interest had taken place before their date, the plaintiffs had no notice of any such fact, nor of any change in the proprietorship of the business, until July 13, which was nearly a month after the drawing of the last. Whittal was the individual named by the defendant as the person who would draw the drafts on his behalf, and he had drawn all which preceded these two in question. Upon these drafts there could be no question but that the acceptances were properly chargeable to the defendant. If one employs an agent who deals with another on account of his principal, and he revoke the agency but do not give notice to the party with whom the agent had dealt, the principal is bound by the subsequent dealings had in good faith with the agent. *Pal. on Ag.* by Lloyd, 170, 188; *Story on Ag.* § 470; 2 *Kent Com.* 615; *Vernon v. Manhattan Co.*, 22 *Wend.* 183.

Another position of the defendant's counsel is that the plaintiffs' acceptances, to a considerable amount, matured and were paid after the defendant had ceased to be interested in the business, and it had passed into the hands of a corporation. It is urged that there is no evidence that the acceptances had been negotiated to a *bona fide* holder. The course of business was for Mr. Whittal to send the drafts, which were payable at six months, to the plaintiffs for acceptance, who returned them accepted, either to Whittal or to some other agent of the drawer named by him. The evidence does not show who was the holder when this paper matured, though the circumstances render it extremely probable that the defendant or Whittal used them by procuring them to be discounted in the course of the business. Still the evidence is not positive to that point. When produced by the plaintiffs on the trial they

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all bore the blank indorsement of the defendant. To charge the plaintiffs with having paid them in their own money so as to deprive them of the right to charge the defendant with such payment, an unlawful diversion of them should have been proved, and that plaintiffs paid them with notice of such diversion. As the evidence stands, it presents only the case of the plaintiffs accepting negotiable bills at the defendant's request, under the arrangement to accept by way of advance, placing such acceptances in his hands to do with them as he pleased, and paying the bills to the holder at maturity. There is, I think, no principle which can justly preclude the plaintiffs from charging the defendant with the money thus paid.

The defendant's counsel contends, lastly, that the plaintiffs have released the defendant by means of their dealings with the company to whom he had transferred the manufacturing business. The defendant gave in evidence an instrument dated June 28, 1854, by which certain parties describing themselves as the president, treasurer, and agent of The Glenville Woolen Company, in consideration of a transfer to that company made by the defendant, of the property employed in the manufacturing business there, engaged to assume the defendant's liabilities incurred in that business, and to indemnify him against such liabilities. The plaintiffs received notice of the change of the business on July 13 thereafter, and a few days later they were informed that the company had assumed the defendant's liabilities.

In the latter part of the summer of 1854 the goods which the plaintiffs had received from the defendant to sell had fallen in price, and it had become difficult to sell them, and they became anxious for a reduction of their advances, the balance of which amounted to over eight thousand dollars, which exceeded the proportions of the then market value of the goods for which they had agreed to accept in advance, and the drafts they had accepted were about maturing. They consequently contracted for such reduction. The correspondence was with Whittall, who had become the managing agent of the new proprietors, who, as has been mentioned, had assumed the liabilities of the defendant. The defendant insists, in the first place, that the plaintiffs had so contracted as to accept the new com-

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pany as their debtors in the place of the defendant and to discharge the latter. But there is no evidence of an intention on their part to make such change. They had been told that this company had undertaken to discharge the liabilities of the defendant. It was indifferent to them what party paid them, so that they were paid by some one, and they naturally called upon Whittal and the other persons who represented this company, for payment, as this company had been named to them as the parties who were to liquidate their liabilities. This was the more proper because the company had become the owners of the goods on their hands, and entitled to control them, subject to the factor's lien. There was nothing in the correspondence which ensued which operated as a release of the defendant, unless the making and transmission of the bills and notes to be now mentioned had the effect of extending the time of payment of the debt which the defendant owed them. By the letters which passed between Whittal and the plaintiffs from August 31 to November 13, 1854, inclusive, an understanding seems to have been arrived at that the plaintiffs' account should be reduced by the payment of three thousand dollars in cash, and that they should receive the drafts of the company on themselves for about six thousand two hundred dollars, payable on time, which they should procure to be discounted at the then prevailing rate of interest, in order to place themselves in funds, and in the mean time sales of the remaining goods were to be made as fast as practicable. Accordingly, on November 13, Whittal sent to the plaintiffs three drafts of the company, amounting together to six thousand two hundred dollars, bearing different dates in October and November, each payable six months from date, "to be discounted," as his letter expressed it, "and the proceeds used in liquidation of advances made against goods held by you on our account." The plaintiffs immediately acknowledged the receipt of the drafts, saying that it "would all be very well if they had been accompanied with a check for \$3,000," which they hoped he would still remit. They did not procure the drafts to be discounted or use them in any way, and the three thousand dollars was never remitted,—Whittal, writing them on November 18, saying that he could not possibly send the

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cash at present on account of the extreme pressure of the money market.

These drafts did not operate to extend the time of payment of the balance due from the defendant; for, first, they were only to be received in connection with the cash payment which was to have been made at the same time, and which was never made; and, secondly, they never became operative instruments in the hands of the plaintiffs. They were the drawees, and could never have maintained an action on them against the drawers and indorsers. It is unnecessary to say what would have been their effect if the plaintiffs had procured them to be discounted by third parties; but this they did not do, apparently because Mr. Whittal had not fulfilled his part of the arrangement under which they were sent.

But some time in April, 1855, Whittal sent to the plaintiffs two promissory notes of this company dated respectively on the first and twenty-seventh of that month, for one thousand dollars each, and payable six months after date. The purpose of transmitting this paper is not fully explained, but it seems probable from the correspondence that it had some reference to the cash payment agreed to be made the preceding year. The receipt of these notes is relied upon as extending the payment of so much of the debt due from the defendant, the argument being that, under the circumstances, the defendant is to be considered as standing in the relation of a surety for the company, it being the principal debtor. I hardly believe these notes were sent on March 22, 1855. The plaintiffs being apparently under some apprehension that the ground now relied upon might be taken, addressed themselves directly by letter to the defendant. They mentioned to him that the balance in their hands was about eight thousand dollars, and gave him a statement of the quantity of goods remaining unsold. They then referred to an interview between Mr. Chase, one of the plaintiffs' firm, the defendant himself, and Whittal, a few weeks before, in which it was, as they say, agreed that their advances should be reduced by the Glenville Company, giving their notes for that purpose, with a letter from the defendant approving the same, and that they, the plaintiffs, had learned by a letter from Whittal that he desired a little more time to

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perfect that arrangement, and that they would be satisfied with an answer from him that it should be arranged in the first two weeks of the next month. The defendant answered that letter from New York the next day. He makes no denial of the interview referred to by the plaintiffs, or of the arrangement said to have been made, but says he will lay their letter before Whittall on his return from a journey upon which he was then absent; that he knows no reason why an arrangement he had agreed upon should not be carried out by him within the time suggested. This letter is somewhat cautious, and a little evasive; and looking at it in the light of subsequent events, there is some ground to suspect an intention to lead the plaintiffs on to a committal which would discharge the defendant from his liability. It imports, however, *prima facie*, the consent of the defendant, that the plaintiffs might receive the notes of the company without prejudice to his liabilities, and such is the sense in which the plaintiffs had, in my opinion, a right to receive it, and in which they certainly did regard it. That they did so regard it is entirely evident from their receiving the notes of the company shortly afterward. The notes were not paid, but were protested at maturity, and the company failed in December following. The defendant cannot, in my judgment, object that the plaintiffs had given time to the company to his prejudice, as the evidence shows that the notes were taken with his consent, and in pursuance of an arrangement to which he was a party. There are some minor circumstances relied upon by the defendant's counsel, but which do not materially change the aspects of the case. The drafts forwarded in November were at one time credited in an account current, but were taken out upon the re-statement of the account. As they were never operative against the company, or any one, the crediting them was simply an error in book-keeping which did not prejudice the defendant.

Upon a review of the whole case, my conclusion is that the defendant had no defense to the claim upon which the judgment was recovered, and that we should not be able to reverse it if the review had been upon the facts.

All the judges concurred, except ROSEKRANS, J., absent.

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Judgment affirmed, with costs, with three per cent. damages.

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December, 1864.

Affirming 39 Barb. 42.

An indorser of a *non-negotiable* note may be held as maker, and is not entitled to demand and notice.

Where a non-negotiable note has been indorsed, the holder may overwrite the indorser's name with a contract of guaranty, or recover against him as a maker of the note.*

John H. Richards, as executor of Platt Richards, deceased, sued George O. Warring and others, in the supreme court, to recover on a promissory note made in the following form:

"One year after date we promise to pay Platt Richards eight hundred dollars, with interest, value received.

"Amsterdam, April 1, 1857.

"JAMES E. WARRING,

"JAMES B. CHAPMAN."

Indorsed or signed on the back, "GEORGE O. WARRING."

George O. Warring was the only defendant who defended. On the trial, James E. Warring, one of the defendants, under objection, testified as follows, in answer to the question as to what took place between him and George A. Warring in relation to his signature on the note.

"I first presented to him a note similar to this, except that it was payable on demand, and asked him to indorse it; he refused and said if we would make it one year after date he would indorse it. I then made this note, and George O. Warring indorsed it."

The referee found the making, indorsing and delivery of the note, and that the defendant, George O. Warring, had no portion of the proceeds of the said note nor any benefit therefrom, and had no notice of demand of payment, or other notice of protest.

* Followed in *Cromwell v. Hewitt*, 40 N. Y. 491; and see *Gilbert v. Sharp*, 2 Lans. 412; *Phelps v. Vischer*, 50 N. Y. 69.

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He held, as a conclusion of law: I. That the defendant, George O. Warring, signed with the intent to become liable to pay the same to the payee. II. That the plaintiff was entitled to recover against all the defendants, *as makers*, the amount of the note.

The supreme court, at general term, on appeal, affirmed the judgment entered on the report of the referee, that court holding that the Code had not abolished the distinction between negotiable and non-negotiable paper, and that the liability of a person indorsing a non-negotiable note was a pure question of law, and that such person was not an indorser nor a guarantor, but was a joint promisor with the other signers, and that the precise locality of his signature upon the note was immaterial. Reported in 39 *Barb.* 42. From the judgment of the general term the defendant, George O. Warring, appealed to this court.

John K. Porter, for defendant, appellant,—Urged that *Leonard v. Vrendenburgh*, 8 *Johns.* 29; *Hough v. Gray*, 19 *Wend.* 202, and *Luqueer v. Prosser*, 1 *Hill*, 256, which went upon the same doctrine as the court below, were overruled by *Brewster v. Silence*, 10 *N. Y.* 207; *Spies v. Gilmore*, 1 *Id.* 324, and *Hall v. Farmer*, 5 *Den.* 584. That *Nelson v. Dubois*, 13 *Johns.* 175; *Campbell v. Butler*, 14 *Id.* 349, and *Latran v. Woram*, 1 *Hill*, 91, were overruled by *Moore v. Cross*, 19 *N. Y.* 227, and *Hall v. Newcomb*, 7 *Hill*, 416. That the court might allow words of negotiability to be inserted, citing *Brown v. Curtis*, 2 *N. Y.* 227; *Kershaw v. Cox*, 3 *Esp.* 245; *Byron v. Thompson*, 1 *Perry & D.* 71; *Moore v. Cross (above)*; *Boyd v. Brotherson*, 10 *Wend.* 93. That omission of demand and notice was fatal, *Moore v. Cross (above)*, and 23 *Barb.* 538; *White v. Low*, 7 *Id.* 206; *Ellis v. Brown*, 6 *Id.* 304; *Jackson v. Richards*, 2 *Cai.* 343; *Dean v. Hall*, 17 *Wend.* 223.

John H. Reynolds, for plaintiff, respondent;—Cited 1 *N. Y.* 524; 2 *Id.* 227; *Griswold v. Slocum*, 10 *Barb.* 402; *Seabury v. Hungerford*, 2 *Hill*, 80; *Edw. on Bills*, 133, 167, 230; *Story on Notes*, §§ 128, 472; *Story on Bills*, § 199; *Josselyn v. Ames*, 3 *Mass.* 274; *Mories v. Bird*, 11 *Id.* 436; *Oxford Bk. v. Haynes*,

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8 *Pick.* 122; *Hall v. Newcomb*, 3 *Hill*, 233; *Union Bank v Willis*, 8 *Metc.* 504; 3 *Kent Com.* 77; *Porter v. Potter*, 18 *N. Y.* 52.

HOGEBROOM, J.—The defendant is prosecuted by the payee of a non-negotiable promissory note as a party thereto. What his precise character and liability are, is the question to be determined. The defendant insists that he is simply an *indorser*, and can be held only in that character, and that as no steps were taken to charge him in that capacity, he is not liable. The plaintiff insists that the defendant is liable in some character other than that of strict indorser for the payment of the note, that he cannot be regarded strictly in the light of an indorser of commercial paper, because the note is not negotiable, he therefore neither possesses the character nor is entitled to the privileges of an indorser, nor to require that the ordinary steps should have been taken to charge him as indorser. The defendant's name appears upon the back of the note, and in a perfectly correct though limited sense, he may be said to have *indorsed* the note, that is, to have written his name upon the back of it. If the note had been negotiable it is clearly settled that he could not have been held without a regular demand and protest of the note, and this upon the principle that as the paper admitted of the contract of indorsement, and the name was written in the place and in the manner in which the names of indorsers usually appear, he must be *presumed* to have intended to adopt that character and no other.

But in the present case the defendant is not an indorser in the commercial sense, and the paper does not on its face import the contract of indorsement. We cannot, therefore, *presume* an intention to assume only the restricted liability of an indorser. The defendant must, therefore, be held in some other character, or must be absolutely discharged as not having contracted any effectual legal liability whatever. We cannot presume that he designed to contract no liability whatever, for he has signed the note, and, apparently, to give the benefit and responsibility of his name to the party to whom the same should be negotiated; and there are cases which have held parties who have signed under such circumstances, so

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that there is no legal impossibility which prevented the defendant from becoming liable in some form.

The defendant signed the note before it was negotiated ; he signed it at the request and for the benefit of the makers, to enable them to raise money on it ; he signed it, as the referee has found, "with the intent to become liable to pay the same to the payee." It was negotiated to the payee after he had thus signed it, and the money obtained upon it ; in fact, we may presume upon the credit of his name. He ought, therefore, to be held upon it, if it may be done consistently with the rules of law ; and I think he may be without violating any legal principle. It is impossible, as before stated, to confer upon him the character of an indorser, or, in the absence of evidence to infer that he intended to assume that relation. Nor, in my opinion, does the evidence of what took place when he made his signature—if that evidence be admissible—show that he intended to contract in that character. He was first presented by the maker of the note with one similar to the present, except that it was payable on demand, and asked to indorse it, which he declined to do, but said he would indorse it if made payable one year after date. The present note was then drawn, and the signature of the defendant procured.

It is fair to infer from this evidence that by the language employed the defendant was not contemplating the contingent liability of an indorser only in the strict sense of that term ; for the law, which he is presumed to know, did not admit of such a relation ; but rather that he would indorse the paper by writing his name upon the back of it, and contract thereby such relations to the other parties to the paper as such a signature would confer or entail upon him. And the referee has, in effect, found that he intended to assume such a relation. He designed, then, to be a *surety* of the makers to the payee, and may be held in that character. What precise name such a relation entitles him to, it is perhaps not indispensable to determine, as I think a complaint setting out the circumstances under which the note was executed, the manner of the signature, and the intent of the party to become liable thereon, would show a cause of action which would entitle the plaintiff to re-

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cover. He is, in effect, the maker of the note, an original party to the instrument, whose name, equally with that of the other makers, was intended to give currency and credit to it in the hands of the payee, and on the faith of whose signature, either as principal or as surety for the other makers, the paper was discounted. The signature on the back of the instrument is not inconsistent with his liability as a maker, if he, in fact, intended to assume that character.

Perhaps also he may be held as guarantor. A contract of that description does not appear to me irreconcilable with the liability he intended to assume; and, if he meant to be liable in that character, a contract of that description might be written over his name, and I think a consideration "for value received" therein stated, inasmuch as the facts developed on the trial show a sufficient consideration to bind him.

It is enough, however, in my opinion, to declare that he is liable, on the facts proved, to pay the note, and it is not important whether he be called by one name or another.

I find only a single reported case in our own reports resting on facts precisely similar to those which appear in the present case. That is the case of *Griswold v. Slocum*, 10 *Barb.* 402. The result arrived at in that case is the same as that to which I have come. The cases there referred to (*Seabury v. Hungerford*, 2 *Hill*, 80, 84; and *Hall v. Newcomb*, 3 *Id.* 233; 7 *Id.* 416) adopt a course of reasoning which I think warrants a similar conclusion. The case of *Seymour v. Van Slyck*, 8 *Wend.* 403, in effect decided what is declared in the head-note, to wit: that "the indorser of a note not negotiable has no right, in an action against him, to insist upon a previous demand of the maker and notice of non-payment. The indorsement is equivalent to a guaranty that the note will be paid, and not a conditional undertaking to pay if the maker does not. An absolute guaranty may be written over the indorsement, upon which a recovery may be had." The only difference which I discover between that note and the present one is that in that, the name of the indorser did appear in the body of the paper as payee thereof, while in this the plaintiff's name is inserted as payee. The cases upon this branch of the law—mostly, however, confined to commercial paper—are numerous, and have

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undergone searching examination, and have led to some conflict of decision. It is unnecessary to refer to them at large. I think the result of the authorities is very well expressed by the compiler of *Abbott's Digest*, in a note to title *Bills, Notes, &c.*, subdiv. Transfer by Indorsement, vol. 1, p. 440 (2 ed. p. 491), in these words: "If the note is not negotiable, the payee is authorized to overwrite a contract of guaranty, or an original promise to pay the note, over the name indorsed, and maintain an action thereon; because, unless the indorsement is held to imply such an authority, it is wholly inoperative and senseless; as there can be no liability as indorser in strictness of a non-negotiable note."

The judgment should be affirmed.

DAVIES, J. [After stating the facts.]—The cases of *Hall v. Newcomb*, 7 *Hill*, 416, and *Spies v. Gilmore*, 1 *N. Y.* 321, have finally settled the law in this State, that when the paper is negotiable, the party indorsing it as security, before delivering it to the payee, could be held liable *only* as indorser, and is entitled to notice of protest after demand made of the maker. But this rule is applicable *only* to paper negotiable, and not to paper not negotiable. In reference to the latter class there cannot, legally speaking, be a contract of indorsement, and all parties to such paper, if charged at all, can only be charged either as makers or as guarantors. This distinction is fully recognized as well by text writers as by the authorities. *Edw. on Bills*, 167, 230. When a party writes his name on the back of a note not negotiable, as there is no contract of indorsement, the courts endeavor to prevent the utter failure of the contract by giving it effect in some other way, as by allowing the holder to overwrite the indorser's name with the real contract implied by law, or recover against him as a maker or guarantor of the note. *Seymour v. Van Slyck*, 8 *Wend.* 403, 421, and cases there cited; *Dean v. Hall*, 17 *Id.* 214; *Josselyn v. Ames*, 3 *Mass.* 274; *Hunt v. Adams*, 5 *Id.* 358; *Herrick v. Carman*, 12 *Johns.* 159; *Seabury v. Hungerford*, 2 *Hill*, 80; *Hall v. Newcomb*, 3 *Id.* 233; *Griswold v. Slocum*, 10 *Barb.* 402.

The latter case is quite in point. There the action was against William Slocum, who had written his name on a non-

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negotiable note payable to the plaintiff. The court, in its opinion, say that the defendant put his name on the note as security at the time the note was made and before its delivery to the plaintiff, and that the law was well settled that under such circumstances the defendant may be held liable as maker or guarantor. Unless he is thus liable, he escapes all liability on his contract. His name is placed on the back of the note, but he is not strictly an indorser, because a legal indorsement can only be made on an negotiable note.

In *Josselyn v. Ames*, *supra*, it was held that an indorsee for a valuable consideration of a note not negotiable, may write over the name of the person whose name is written on the back of the note, a promise to pay the contents of the note to the indorsee, who may maintain an action upon such a promise, against such person. This was virtually making the defendant liable as a maker. This decision has been frequently recognized as law by the courts of this State, in the cases already cited. In *Seabury v. Hungerford*, *supra*, BRONSON, J., said "if the note had not been negotiable, or, if for any other reason, the case had been such that the defendant could not, by the exercise of proper diligence, have been charged as indorser, and there had been an agreement that he would answer in some other form, then the plaintiff might have written over the name such a contract as would carry into effect the intention of the parties. When a contract cannot be enforced in the particular mode contemplated by the parties, the court, rather than suffer the agreement to fail altogether, will, if possible, give effect to it in some other way." And in *Hall v. Newcomb*, *supra*, Justice COWEN said that the right to require presentation and notice, depended entirely on the fact of the negotiability. That when the contract was that of indorsement, which was always the case upon a negotiable note, the giving it effect in any other form, would, therefore, be going beyond the principle which makes a contract inure, as having a different effect from what its direct words import. That such a forced construction should never be made, except to prevent a failure of the contract altogether. "*Ut res magis valeat, quam pereat*. This maxim, in *Seabury v. Hungerford*, furnished the only ground for changing a simple indorsement

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into a guaranty, or an absolute promise. Being on a note payable to the holder, not negotiable, and so no possibility of raising the ordinary obligation of indorser, there was then room to infer that a different obligation was intended, whether the indorsement be for the purpose of giving the maker credit on a future advance or not."

In the case now under consideration, no such ambiguity prevails. The referee has found that the defendant, George O. Warring, signed the note with the intent to become liable to pay the same to the payee. It is to be observed that the finding is characterized by the referee as a finding of a conclusion of law. It is nevertheless a finding of a fact in the action, and is none the less so, although designated as a finding of a conclusion of law. We regard the finding of referees what they in truth and in fact are, disregarding the name given to them. It is therefore incontrovertible that the defendant signed his name to this note, because it was delivered to the plaintiff's testator; that it was so signed with the intent of giving or obtaining credit from him, and that the money was advanced on the faith of such signature. We have seen that it is not a contract of indorsement, and there would be a singular failure of justice if we did not regard the contract of the defendant, as what all parties intended at the time it should be, namely, a promise on the part of the defendant to pay the money advanced on the faith of the note, with his signature thereon. Concede that it was a contract of suretyship, it follows conclusively that it was not a contract of indorsement, upon which, as preliminary to the defendant's liability, there should have been a demand of payment of the makers, and notice of such demand and refusal to the defendant, as was observed by the court in *Griswold v. Slocum*, *supra*. The reason why this is not the law in regard to paper not negotiable, is to prevent an entire failure of justice. *Ut res magis valeat, quam pereat*. Not being liable as indorser, if he cannot be held responsible as maker or guarantor, the party escapes all accountability on his contract. The distinction in this respect, between paper negotiable and not negotiable, has been plainly recognized, and is now well established. All the conflict of authority has been

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in regard to negotiable paper. There has been no conflict in regard to paper not negotiable.

In the present case it cannot be said, that in holding this defendant accountable upon the contract he has entered into, the court is making for him a different contract than that made by himself. He certainly did not make a contract of indorsement which only requires as a condition precedent to his liability, a demand of the maker for payment, and notice of such demand and refusal, to the defendant, as indorser. He certainly entered into some contract with the plaintiff's testator. What was that contract? It is believed that it has been satisfactorily shown to be a contract of guaranty, or that of an absolute promise to pay as one of the makers of the note, in which aspect we regard it. The defendant's liability to pay is unquestionable, and therefore the judgment against him was correct, and should be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

RICHTMYER v. MORSS.

March, 1867.

Where a building is erected upon the land of one person by another person, without any authority or agreement in respect thereto, it becomes a part of the realty and passes with a conveyance of the land; and to take the case out of this principle, on the ground that the building was erected by a tenant for purposes of trade and business, it is not enough to show that it was occupied for the purposes of business, but the existence of the relation of tenant must be made out by express proof or clear implication, and it must also be shown that the building was erected by the tenant for the purposes of trade or business, and that he exercised his right of removal during the term.*

John G. Richtmyer sued Burton G. Morss, Luman Reed, and Roman H. Gleason, in the supreme court, to recover the value of a certain building located on the lands of the defend-

* See *Voorhis v. McGinnis*, 48 N. Y. 278, reversing 46 Barb. 278; *Potter v. Cromwell*, 40 N. Y. 287.

ants, which he claimed as owner, and which was taken possession of and removed by defendants. The building was erected by one Vroman in the fall of 1849, at which time the land upon which it was erected was owned by Alonzo C. Paige and others. It was a good frame building, as described by the plaintiff, fifteen by sixteen feet, ten feet posts, nicely inclosed with pine siding, pine shingles, a good cornice on one end, painted white, with two coats; one door outside and one inside; two windows, one in the front end and one in the side, and a window in the back end; there was a partition in it lathed and plastered, counter and shelves in the front part of the building. The building stood on a foundation of loose stones, with a back chimney in it. The plaintiff purchased it on November 21, 1859, having previously occupied it for six years. The defendants removed it in December, 1860. The plaintiff testified he did not know by whose authority the shop was built there; did not know for whose benefit Vroman built it; he did not know that Vroman occupied as tenant of any body when he erected the building.

The defendants then proved that on June 16, 1860, they entered into a written contract with Paige and Potter, then the owners of the land upon which said building was located, and agreed to pay therefor the sum of two thousand five hundred dollars, on the execution of a good and sufficient deed therefor, and that the defendants took possession of said land under said contract. That they were in possession under that contract at the time the shop was removed; that there were several other buildings on this lot at the time they bought, and the defendants took possession of the whole lot and all the buildings, including this shop; that the defendants subsequently received a deed for said premises pursuant to the terms of their contract; that the defendants have occupied all the premises since the contract to them.

The judge charged the jury that as matter of law the plaintiff was entitled to recover, to which charge the counsel for the defendants then and there duly excepted. The judge further charged that the only question for the jury to consider was the question of damages, and to this the defendants also excepted.

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The supreme court relied on the cases of *Smith v. Benson* and *Ombony v. Jones*, and held that there was reason to infer, from length of time, in connection with other circumstances, that the building was there by permission of the owners of the land.

S. L. Mayham, attorney for defendants, appellants;—Cited *Smith v. Benson*, 1 *Hill*, 178; *Buckley v. Buckley*, 11 *Barb.* 63; *Fisher v. Saffer*, 1 *E. D. Smith*, 611; *Mott v. Palmer*, 1 *N. Y.* (1 *Comst.*) 564; *Godard v. Gould*, 14 *Barb.* 662; *Fryatt v. Sullivan Co.*, 5 *Hill*, 116; 11 *W.* 54; 1 *Cow.* 3 ed. 322; *McLaughlin v. Waite*, 9 *Id.* 670; 13 *How. Pr.* 219; *Dolsen v. Arnold*, 10 *Id.* 528; *Fitzgerald v. Alexander*, 19 *Wend.* 402; *Small v. Smith*, 1 *Den.* 583.

Miller & Doyle, for plaintiff, respondent;—Cited *Ombony v. Jones*, 19 *N. Y.* 234; 1 *Hill*, 178; 39 *Me.* (4 *Heath*), 519; 19 *Conn.* 154; 10 *Barb.* 500; 1 *Comst.* 564; 4 *Coke*, 63; 3 *McCord*, 533; 8 *Mass.* 411; 1 *Fairf.* 429; *Mott v. Palmer*, 1 *N. Y.* (1 *Comst.*) 580; *Viele v. Troy & Boston R. R. Co.*, 20 *N. Y.* 184; *Marine Bank v. Clements*, 31 *Id.* 43; *Dows v. Rush*, 28 *Barb.* 180.

DAVIES, Ch. J. [After stating the above facts.]—I think the learned judge at the circuit was in error in holding, as a matter of law, that upon the testimony the plaintiff was entitled to recover. The testimony showed, in brief, that the plaintiff had become the purchaser of a building erected upon land owned by the defendants, and that the defendants had taken possession of the building and removed it, as they clearly had a right to do if it was attached to the freehold, and passed under the contract and conveyance to them. That it did so pass is established by authority. *Mott v. Palmer*, 1 *N. Y.* (1 *Comst.*) 564. In that case Judge BRONSON said: "The word land includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences. This is but common learning; and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and

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fences, than there is that it will carry growing trees and herbage upon, or mines and quarries in the ground."

The cases relied upon to take this case out of this well-recognized and firmly-established rule of law, do not apply to the facts as proven on the trial of this action.

In the first place, it was not established that this building was erected upon any agreement between Vroman and the then owners of the fee of the land, that it was to be considered strictly a personal chattel. Second, it was not proven that the building was erected by a tenant, for the purposes of his trade and business, or that the relation of landlord and tenant ever existed between Vroman and the defendants' grantors, or between them and the plaintiff. The first proposition was necessary to be established to make applicable the doctrine of the case of *Smith v. Benson*, 1 *Hill*, 176. In that case, COWEN, J., said: "Thus both parties agreed to consider it (the building in question) as in a state of severance from the freehold; and no one had ever thought of its being so fixed as to be irremovable. *Prima facie*, such a building would be a fixture, and would not be removable. The legal effect of putting it on another's land would be to make it a part of the freehold. But the parties concerned may control the legal effect of any transaction between them by an express agreement. They have in effect stipulated that the placing this building on the ground should work nothing more toward changing its nature than if it had been the loose timber of the house, instead of the house itself. The law often implies an agreement of nearly the same character from the relation of lessor and lessee, or tenant and remainder-man; and surely, the parties may, by express agreement, do the same thing, and even more."

Equally inapplicable is the doctrine of *Ombony v. Jones*, 19 *N. Y.* 234, as the second proposition above stated was not established by proof. The rule to be gathered from the case is there stated thus by Judge GROVER: "That a tenant may remove, during his term, all erections made by him for the purpose of trade that can be removed without injury to the land, or something attached thereto."

But in the case at bar no tenant sought to exercise such right during his term. There is an utter failure to establish

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the first foundation for invoking the aid of such a principle, viz: that the relation of tenant at any time existed. When that fact was proven, it then would have been needful to show that the building in question was erected by the tenant for the purposes of trade or his business, and that he exercised his right of removal during his term.

Upon the facts proven upon this trial, there can be no doubt that the defendants were the owners of the building in controversy, and it follows that the plaintiff is not entitled to recover its value. The learned judge erred in charging the jury that, as a matter of law upon the facts proven, the plaintiff was entitled to recover.

The judgment must be reversed, and a new trial ordered; costs to abide the event.

PARKER, J.—If the building in question is to be deemed to have been a part of the realty, the plaintiff was not entitled to recover for its appropriation by the defendants.

It is undisputed that Vroman, who built it, was not the owner of the land on which it was built, either in fee or as a tenant for life or years; nor is there any evidence tending to show that he built it pursuant to any agreement or understanding whatever with the owner of the land. So far as appears, he was a trespasser in erecting it upon the land where it was placed.

Under this state of facts, there can be no doubt that it became, when erected, a part of the land on which it was erected, and thenceforth real and not personal estate. *Smith v. Benson*, 1 *Hill*, 176; *Miller v. Plumb*, 6 *Cow.* 665; *Ford v. Cobb*, 20 *N. Y.* 344; *Murdock v. Gifford*, 18 *Id.* 28; *Snedeker v. Warring*, 12 *N. Y.* (2 *Kern.*) 170; *Ombony v. Jones*, 19 *N. Y.* 234. It was sufficiently fixed to the freehold. *Smith v. Benson*, *supra*; *Goodrich v. Jones*, 2 *Hill*, 142; *Bishop v. Bishop*, 11 *N. Y.* 123; *Mott v. Palmer*, 1 *N. Y.* (1 *Comst.*) 564.

There can be no doubt that as between vendor and vendee it would be held to be real estate, and pass by the deed of the land. The same rule must apply as between these parties.

Nothing occurred after the erection that changed the property from real to personal. All that the plaintiff swears to in

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reference to his interview with defendant Reed, comes far short of producing such effect. It may be said that it shows an admission that plaintiff was entitled to pay for the building. If any admission is shown, it is not that plaintiff was entitled to pay from defendants, but from their grantors, which was equivalent to a claim of ownership, as between defendants and such grantors.

What the plaintiff says he told Luman Reed in regard to his conversation with John Reed, is no evidence of such conversation with John, for he does not testify that he said it.

I am unable to see any legal ground to recover, and am of the opinion that the judgment appealed from should be reversed, and a new trial ordered.

All the judges concurred, except PORTER, J.

Judgment reversed, and new trial ordered.

RICKERSON v RAEDER.

December, 1864.

The buyer of a chattel which was mortgaged delivered to the mortgagee a part of the consideration of the sale, upon an understanding between all parties that the latter should relinquish his claim on the chattel and look to the mortgagor for the balance due on the mortgage. *Held*, that though he gave no formal discharge, he could not afterwards enforce the mortgage against the buyer of the chattel.

Willey Rickerson sued Paul Raeder, in a justice's court, to recover the value of a colt and a rope halter, which the plaintiff alleged had been taken from him by the defendant. Defendant set up title under a chattel mortgage; which plaintiff in reply claimed had been paid.

On the trial the following facts appeared: One Herman Heinick, who was the original owner of the colt, had mortgaged it to the defendant to secure the payment of eighty dollars. This mortgage, which contained a power under which the defendant had seized the colt, was duly filed. The plaintiff wishing to purchase the property in question, which had continued in the possession of the mortgagor, an arrangement was made

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between the mortgagor and mortgagee, by which, in consideration of receiving six dollars in money, the release of ten dollars which he owed the mortgagor, and the note of Asa Johnson for fifty dollars, which belonged to plaintiff, he agreed to release the colt from the mortgage in a day or two, and let the plaintiff have him, and look to Heinick for the balance of the mortgage money. Evidence was adduced to show that the note was worth far less than the sum due on its face, and that the plaintiff and Heinick were both aware of this when the bargain was made, and had made false representations to the defendant to induce him to take the note in payment. It was proved that the plaintiff had actual notice of the mortgage, and that the mortgagee knew at the time of the payment that the plaintiff was going to buy the colt. In the justice's court the plaintiff had a judgment for ninety dollars, which was affirmed by the county court.

The supreme court, at general term, however, on appeal, held that the lien of the mortgage had not been actually released, and that so long as there was anything unpaid the lien remained in full force, and the defendant might take possession of the property. Plaintiff appealed to this court.

Lyman Tremain, for plaintiff, appellant.

S. A. Givens, for defendant, respondent;—Cited *Butler v. Miller*, 1 *N. Y.* 496; *Fox v. Burns*, 12 *Barb.* 677; *Stuart v. Taylor*, 7 *How. Pr.* 251; *Rich v. Milk*, 20 *Barb.* 616; *Mattison v. Baucus*, 1 *N. Y.* 295; *Vail v. Foster*, 4 *Id.* 312.

BY THE COURT.—T. A. JOHNSON, J.—In the action before the justice, the defendant justified the taking and selling the colt under his chattel mortgage.

The plaintiff's answer to this defense was, that the defendant had received payment of the amount due on the mortgage, except five dollars and the interest, and that he had agreed to discharge the mortgage for the residue, and look to the mortgagor for such residue. The alleged payment consisted of a note of hand for fifty dollars, against one Johnson, six dollars in money, and a credit of ten dollars on book account by the mortgagor. The evidence tends to show that the defendant

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agreed to release the colt from the mortgage in a day or two after the payment, but never did so. The note belonged to the plaintiff, who let the mortgagor take it, to apply on the mortgage, and toward the purchase price of the colt. The defendant had notice when he took the note, that the mortgagor was about to sell the colt to the plaintiff. The plaintiff knew of the existence of the mortgage, which was duly filed. The defendant, instead of discharging the mortgage, returned the fifty dollar note to the mortgagor from whom he received it, within a few days after the same was transferred to him. The evidence tends to show that the plaintiff bought the colt, and paid the mortgagor for it, after the alleged agreement to discharge the mortgage, the price of ninety dollars, including the Johnson note. The action seems to have been tried before the justice, upon the assumption that the note was in fact of little or no value. The questions which appear to have been principally litigated before the justice were, the agreement on the part of the defendant to discharge the mortgage, and the fraud on the part of the mortgagor, when he turned out the note in representing it to be good as cash. The plaintiff obtained a verdict for the value of the colt.

It must be presumed, I think, that the jury passed upon the question of the fraud in turning out the note against the defendant. Otherwise they could not have rendered their verdict against him. This being the case, their verdict in favor of the plaintiff for the value of the colt, was, I think, clearly right. Upon this hypothesis the defendant, knowing that the plaintiff was about to purchase the animal of the mortgagor, provided he could have the note applied in payment, agreed to take this note belonging to the plaintiff and relinquish the claim of his mortgage upon the colt and look to his debtor personally for the small balance remaining unpaid. The plaintiff then buys the colt, being informed that the claim of the mortgage is by agreement to be relinquished, and pays the full price, including the note, which the defendant has already taken. After this it seems to me the defendant should not be allowed to enforce his mortgage for any amount against the plaintiff, purchasing in good faith. The plaintiff in fact paid a part of the mortgage, which he was under no legal obligation to pay, and the agree-

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ment to discharge, as respects him, had certainly a good consideration to support it. The defendant having consented in effect that the mortgagors might sell the colt discharged from the lien of the mortgage, and received a portion of his pay from the purchaser as a consideration of his agreement, ought not to be permitted now to turn round and enforce the mortgage against such purchaser. It is the same in principle as though the defendant had sold the colt himself to the plaintiff. It is no answer to say that the defendant did not in fact discharge the lien of his mortgage according to his agreement. He was bound to do so, and if other rights have intervened on the faith of his agreement, they must be protected. The plaintiff under the circumstances took the colt free from all claims of the defendant and discharged from the mortgage. The law effectuated the discharge, without any act on the part of the defendant, the moment the sale was completed according to the agreement.

Although we may not be satisfied entirely with the verdict of the jury, still there was evidence tending to the conclusion at which they arrived, and a court of review has no right to interfere with the finding in such a case. I am of the opinion, therefore, that the judgment of the supreme court was erroneous and should be reversed, and that of the county court and of the justice affirmed.

All the judges concurred, except WRIGHT, J., who was absent.

Judgment of supreme court reversed, and judgment of county court and justice affirmed, with costs.

RIDER v. POWELL.

December, 1863.

A court of equity may reform a written contract, upon parol evidence of fraud or mistake, although the contract be one which the statute of frauds requires to be in writing.*

It seems, that the mistake must be mutual, or fraud be shown.†

* See also *Prior v. Williams*, vol. 8 of this series, p. 623.

† This point, upon which a majority of the judges were understood to

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George Rider—or Reider—(for whom, on his death pending the suit, Paul and Barbara Rider, administrators, were substituted), brought this action against William D. Powell, to compel specific performance of a parol contract made by defendant to give a bond and mortgage, or to have a bond and mortgage which he had given under the contract reformed, so as to conform to the parol contract between the parties under which it was alleged they were given.

Plaintiff alleged that he sold a farm to defendant, the contract providing that to secure a balance of the purchase money plaintiff was to receive a bond and mortgage for three thousand dollars, payable in ten annual installments of three hundred dollars, with interest each year on the sum unpaid; that defendant, with intent to defraud plaintiff and take advantage of his ignorance of the language, procured him to become intoxicated and thereby induced him to accept a bond and mortgage which stipulated to pay interest only on each annual installment as it became due, but with no provision for the payment of interest on the whole principal remaining unpaid at the time of the payment of such annual installments, thus defrauding him out of a large amount of interest.

The judge before whom the cause was tried without a jury, found only the single fact, that there was "a clear mistake on the part of the plaintiff" as to the interest he was to receive by the bond and mortgage; and decided that as matter of law, he was entitled to have his mistake corrected, and the bond and mortgage amended or modified, so that he should recover annual interest on the whole sum unpaid, and directed a judgment accordingly.

The judgment was affirmed by the court at general term; and the defendant appealed.

Amasa J. Parker, for defendant, appellant.

James B. Olney, for plaintiffs, respondents.

agree, but which was not expressly passed on, was subsequently determined in *Nevins v. Dunlap*, 33 *N. Y.* 676, and *Story v. Conger*, 36 *Id.* 663; and see *Botsford v. McLean*, 43 *Barb.* 473.

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BALCOM, J.—Rider and wife conveyed the farm to the defendant, and he took possession of it and also of the personal property he purchased with it. He paid Rider eleven hundred dollars in cash, and gave him an indorsed note for five hundred dollars in part payment of the purchase money. The oral contract therefore was so far performed as to relieve it from the operation of the statute of frauds; and the defendant could not retain the farm and personal property without giving Rider such a bond and mortgage as their oral contract called for, unless the fact that there was no fraud or mistake on the part of the defendant, as to the terms of the bond and mortgage he gave to Rider, justified him in so doing.

PARSONS says: "The question has often come before our courts, whether oral evidence can be received to show the mistake (in a written contract), and thereby make it in fact a new contract, when an oral contract would be void or not enforceable by the statute of frauds. The course of adjudication is not uniform on this point. But while it cannot be denied that numerous authorities support a disregard of the statute in such cases, others maintain its authority." 1 *Pars. on Cont.* 3 ed. 555. Justice STORY puts the case, "where the party plaintiff seeks, not to set aside the agreement, but to enforce it, when it is reformed and varied by the parol evidence;" and then says: "A very strong inclination of opinion has been repeatedly expressed by the English courts, not to decree a specific performance in this latter class of cases; that is to say, not to admit parol evidence to establish a mistake in a written agreement, and then to enforce it, as varied and established by that evidence. On various occasions such relief has, under such circumstances, been denied. But it is extremely difficult to perceive the principle upon which such decisions can be supported, consistently with the acknowledged exercise of jurisdiction in the court to reform written contracts, and to decree relief thereon. In America, Chancellor KENT, after a most elaborate consideration of the subject, has not hesitated to reject the distinction as unfounded in justice, and has decreed relief to a plaintiff, standing in the precise predicament." 1 *Story Eq.* 7 ed. § 161. ARCHER, J., in delivering the opinion of the court, in *Moale v. Buchanan*, 11 *Gill & J.* 314, 325,

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said: "Had the agreement been entirely by parol, and a part performance, the complainant would have been entitled to relief. Shall he be in a worse situation by having attempted to reduce the whole agreement into the form of a conveyance, if he shall make an omission in the conveyance, by mistake of an essential part of the agreement?" He then answers this interrogatory in the negative, and refers to the opinion of Chancellor KENT, in *Gillespie v. Moon*, 2 *Johus. Ch.* 585, and *Keisselbrack v. Livingston*, 4 *Id.* 144.

A judgment was given in this court, in *De Peyster v. Hasbrouck*, 11 *N. Y.* 582, reforming a mortgage and enforcing it against premises not originally embraced therein.

The supreme court was therefore justified by authority as well as principle in reforming the bond and mortgage in this case, unless the fact that there was no fraud or mistake on the part of the defendant in fixing their terms, or respecting their terms, renders such decision erroneous. The decision in *Mathews v. Terwilliger*, 3 *Barb.* 50, and *Quick v. Stuyvesant*, 2 *Paige*, 84, support this conclusion instead of militating against it.

[The learned judge concluded by expressing the opinion that the contract might be reformed without proof that the mistake was mutual, and therefore that the judgment should be affirmed, in which the court did not concur.]

DAVIES, J., concurred in this opinion.

WRIGHT, J. [After stating the facts.]—We can only review the case upon the pleadings and facts found by the judge and the question is, whether, in a case where a contract between parties provides for the performance of a particular act by them, such contract is entitled to be reformed, in equity, because there has been a mistake on the part of one of the contracting parties, as to its terms, when such mistake is not occasioned by any fraud practiced by the other party.

I suppose the rule to be, that when there is a mistake on one side (and not a mutual mistake), it may be a ground for rescinding a contract, or for refusing to enforce its specific performance, but not a ground for altering its terms. *Adams*

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Equity, 171. A mistake by the plaintiff when he made the contract, as to the interest he was to receive on the bond and mortgage, would not entitle him to have the contract so modified as to conform to his mistaken impression, though it might be a reason for rescinding the contract on the ground that the minds of the parties never met in making it. In *Lyman v. United Ins. Co.*, 17 *Johns.* 375, Chief Justice SPENCER lays down the true rule of law to govern the case (whether the mistake found relates to the bargain or to the taking of the bond and mortgage), that "before a written contract can be amended or altered on the pretense of mistake, the proof must be entirely clear that that mistake has occurred; and secondly, that the amendment sought would conform the contract to the intention of both parties."

If we were to look, however, in this case, beyond the findings of fact by the court, it is clear that the deed, bond and mortgage constituted the true contract, and that all previous negotiations were merged in them. It would be a violation of the plainest elementary principles to permit a party who has entered into a written contract, to have the written contract altered so as to conform to his understanding of a previous negotiation, when the opposite party understood it differently, and as it was set forth in the written contract. The parol bargain was void by the statute of frauds; neither possession being taken under it nor consideration paid. It was after the deed, bond and mortgage were executed and delivered, and under them that the money was paid and possession taken. The court was asked in this case not only to enforce an agreement void by the statute, but one that the parties did not understand alike.

The judgment of the supreme court should be reversed and a new trial ordered, with costs to abide the event.

DENIO, Ch. J., and EMOTT, J., concurred in this opinion.

ROSEKRANS, MARVIN, and H. R. SELDEN, JJ., although of opinion that mutual mistake or fraud must exist, concurred in affirming the judgment on the ground that one or the other must have existed in this case whether expressly found or not.

Judgment affirmed, with costs.

Ring v. Steele.

RING v. STEELE.

September, 1867.

A deed of land is not rendered invalid by the fact that a consideration is not paid; and where after executing and delivering a deed to A., without actual payment of the consideration, the grantor executed a second deed of the same land to B., who had actual knowledge of the prior deed, but recorded his deed before the prior deed had been recorded, and, after the prior deed had been recorded, B. conveyed the land for a valuable consideration to C., who had no actual notice of the prior deed,—*Held*, that C. occupied no better position than B., and that the grantees in the first deed could recover possession of the land.

Barnard C. Ring and Charles H. Richardson sued Daniel Steele and Elijah Smith, to recover the undivided half of four acres of land. Both parties claimed title under one Joseph Steele, the former owner.

Joseph Steele, on February 16, 1852, executed a deed conveying an undivided half of the premises to the plaintiffs. The consideration, the receipt of which was acknowledged in the usual form in the deed, was two hundred and fifty dollars. The consideration, however, was not in fact paid. This deed was not proved nor recorded until March 27; and meanwhile, on March 18, Joseph Steele and his wife executed and acknowledged a second deed conveying the premises to the defendant Daniel Steele, who was the father of Joseph. This deed expressed in the same form the consideration of two hundred and fifty dollars paid, and it was recorded on March 24, three days before the record of the prior deed. Some years later, Daniel Steele conveyed the premises to the defendant Smith, in consideration of two hundred and fifty dollars.

The question litigated was whether the deed given by Joseph to the plaintiffs, or that executed by him after it but recorded before it, to his father Daniel, took preference. The defendants insisted that Daniel Steele was a purchaser for value; but the court held that the acknowledgment of a consideration in the deed to him was not sufficient on this point, and defendants accordingly gave parol evidence that the money or a part of it was paid.

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The plaintiffs then gave evidence tending to prove that Daniel Steele had notice of the plaintiffs' purchase prior to his purchase from Joseph. The defendants gave some evidence tending to contradict this, and also offered to prove that Smith paid the consideration mentioned in his deed from Daniel Steele without any actual notice of the deed to the plaintiffs. This offer the court excluded, and the jury found for the plaintiffs.

The supreme court, at general term, on appeal from the judgment, reviewed the question whether a subsequent conveyance expressing a sufficient consideration and acknowledging its payment, can be deemed sufficient evidence of a purchase for value to defeat a title claimed by another grantee under a prior unrecorded deed; citing *Broom Leg. Max.* 432; *Cow. & H. Notes*, 641; *Warren v. Pierce*, 3 *Wend.* 397; *Sherman v. Crosby*, 11 *Johns.* 70; *Holliday v. Littlepage*; 2 *Munf.* 316; *Judson v. McChessey*, 7 *Cow.* 360; *Kipp v. Denniston*, 4 *Johns.* 24; *Sheppard v. Little*, 14 *Id.* 210; *Tahlheimer v. Brinckerhoff*, 6 *Cow.* 90; and while, on the authority of these cases, doubting the rule laid down in *Wood v. Chapin*, 13 *N. Y. (3 Kern.)* 509, the court, yielding to the authority of that decision, conceded that the deed would be evidence; but being of opinion that the defendants had not been prejudiced by the erroneous ruling on this point, since they had given other evidence of the payment of the consideration, the error was not ground for a new trial. Defendants appealed.

Wm. H. Greene, for defendants, appellants;—Cited 14 *Mass.* 291; 17 *N. Y.* 469, 473; *Howard Ins. Co. v. Halsey*, 8 *N. Y. (4 Seld.)* 271; affirming 4 *Sandf.* 565; 3 *Sandf. Ch.* 192; 2 *Barb.* 151; 4 *Edw.* 329, note; *Jackson v. Post*, 15 *Wend.* 588; *Wood v. Chapin*, 13 *N. Y. (3 Kern.)* 509; 1 *Barb. Ch.* 105; 1 *Johns. Ch.* 566; 2 *Id.* 15; 1 *Cow.* 622; 7 *Id.* 65, 265; *Steel v. Steel*, 4 *Allen (Mass.)* 417.

L. W. Thayer, for plaintiffs, respondents;—Cited 1 *Wend.* 108; *Steward v. Biddlecum*, 2 *N. Y. (2 Comst.)* 103; *Herd v. Lodge*, 20 *Pick.* 53; *Hyland v. Shearman*, 2 *E. D. Smith*, 239;

Ring v. Steele.

Breidert v. Vincent, 1 *Id.* 542; McCotter v. Hooker, 8 *N. Y.* (4 *Seld.*) 497.

BY THE COURT.—PORTER, J.—The effect of the deed to Ring and Richardson was to invest them with title to an undivided half of the premises. By accepting the grant they became liable for the agreed price; and the validity of the transfer was not affected by the non-payment at the time of the purchase money. *Barnum v. Childs*, 1 *Sandf.* 58; *Meriam v. Harsen*, 2 *Barb. Ch.* 232. The subsequent conveyance of the premises by the grantor to his father, was a fraud upon the rights of the previous grantees. Through their neglect to put on record the evidence of their title, and the superior vigilance of the defendant Steele, the deed of the latter would have acquired priority, if he had bought without notice of the antecedent grant. 1 *R. S.* 756, § 1. He paid a valuable consideration; but as he did so with knowledge of the previous conveyance, he was not a purchaser in good faith, and cannot claim the protection of the recording act. The defendant Smith occupies no better position. He is chargeable with constructive notice of the deed under which the plaintiffs claim, as it was recorded before he made his purchase. *Van Rensselaer v. Clark*, 17 *Wend.* 25; *Jackson v. Post*, 15 *Id.* 583.

It is unnecessary to consider the question whether a mere recital by one who has previously parted with his title, that he has received value from a subsequent purchaser, is evidence of that fact as against the previous grantee; for in this case the proof is clear that Steele was a purchaser for value, but with full notice of the plaintiffs' rights.

The record discloses no error prejudicial to the defendants, and the judgment should be affirmed, with costs.

All the judges concurred, except BOCKES, J., absent.

Judgment affirmed, with costs.

Robbins v. Dillaye.

ROBBINS v. DILLAYE.

June, 1866.

Affirming 33 Barb. 77.

A loan, at the full lawful rate of interest, made in bills which were at the time unbankable, and depreciated one per cent. below par, but were current at par in ordinary transactions among individuals, and were not proven to have been originally received by the lender, nor to have been passed by the borrower, below par, is not necessarily usurious; but the question is one of intent, and must be submitted to the jury.

Amos and Eli Robbins sued Stephen D. and H. A. Dillaye, in the supreme court, on promissory notes made by Stephen, and indorsed by H. A. Dillaye, to S. Leland & Co.

The maker, a resident of Syracuse, N. Y., applied to the Lelands, of New York city, for a loan, and it was agreed between them that the Lelands should discount his notes, paying him the amount, however, in bills of the Valley Bank of Hagerstown, Md., in which they were interested, and from which they obtained the bills by ordinary discount of their notes; and that he should give the bills a circulation. The bills furnished him were marked so as to show the period of circulation. These bills, although current at par in ordinary transactions, were then at a discount, in New York, of one per cent., and were not received or paid out by New York city banks. The Lelands had an arrangement with a broker in Wall-street, who redeemed them at one per cent. discount, and shared it with them in the proportion of one-fourth to him, and three-fourths to them. Under this arrangement, he redeemed and returned to them from two thousand to four thousand dollars daily.

Dillaye's notes were discounted at the full lawful rate of interest, seven per cent. He paid out the bills in his business; and it did not appear that Leland originally received the bills from the bank at less than par, nor that Dillaye passed them at less than par. Leland testified that nothing was said about interest in making the loan, nor had he any intent to secure usurious interest; and that Dillaye, in applying for the loan, said these bills would answer his purpose perfectly well.

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Among other things, plaintiffs asked the judge to charge, "that there could be no usury, unless there was a corrupt agreement, intentionally, to get more than seven per cent. for the use of the money;" but he refused so to charge, except with the qualification, "that if the parties made such an agreement as they intended to make, and by it the lender received, and the borrower paid more than seven per cent., the transaction was usurious, although the parties had no intention of violating the usury laws." He also charged, "that if the notes in suit were given under an arrangement that they were for the bills of the Valley Bank, at par, when they were known to be at a discount, then the jury must find for the defendants." . . . "If Leland made such an agreement as he intended to make, and the effect of it was that he would get more than seven per cent. for the use of his money, the transaction was usurious, though he may not have intended to get more than seven per cent."

Due exceptions were taken. The jury found for defendants.

The supreme court, after judgment, granted a new trial, on the ground that the transaction was not necessarily usurious (citing *Bank of U. S. v. Waggener*, 9 *Pet.* 378; *Codd v. Rathbone*, 19 *N. Y.* 37; *Slosson v. Duff*, 1 *Barb.* 432); and that the question whether there was an intent to violate the usury law, should have been left to the jury. Reported in 33 *Barb.* 77. Plaintiff appealed, stipulating to submit to judgment absolute, if the order should be affirmed.

William Tracy, for plaintiffs, appellants. .

B. G. Hitchings, for defendants, respondents.

THE COURT affirmed the order, DAVIES, Ch. J., citing *Stuart v. Mechanics' & Farmers' Bank*, 19 *Johns.* 496, as decisive in favor of the plaintiffs' position that the question should have been submitted to the jury. See also *Bank of Utica v. Wager*, 2 *Cow.* 712, 769; *Flower v. Edwards*, *Cowp.* 112; *Auriol v. Thomas*, 2 *Term R.* 52; *Winch v. Fenn*, *Id. note c.* And in this the other judges concurred, except PECKHAM, J.,—who was of opinion that the case was distinguishable from *Stuart*

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v. Mechanics' & Farmers' Bank (above), and from **Thomas v. Murray**, 32 N. Y. 605,—and except **J. C. SMITH** and **MORGAN, JJ.**, who did not vote.

Order affirmed, and judgment absolute for plaintiffs, with direction that the supreme court ascertain and render judgment for damages, with costs.

ROBIE v. SEDGWICK.

March, 1868.

Affirming 35 Barb. 319.

As against a simple trespasser, the facts that the plaintiffs have acted as trustees of a school district, and their predecessors had been for years in possession as such, of the school-house, is sufficient evidence of their incorporation.

A trespasser cannot defend an action brought by one in possession of land, claiming to be owner, by alleging a breach of a condition in the deed under which plaintiffs claim.

Reuben Robie, and two others, trustees of school district No. 5, in the town of Bath, brought an action in the nature of ejectment, in the supreme court, against William Sedgwick and Richard Hardenbrook, to recover possession of the school-house lot.

After many years' occupation the school-house was burned down, and an owner of adjoining ground extended his fence so as to include the lot, and two years afterward sold the whole inclosure to third persons, and defendants obtained possession under a contract with them for the purchase of the property.

It was proved on the trial, in addition to these facts, that school meetings had been held in the house, that trustees were elected, school-houses were erected, and all the business connected with a school district was transacted by the district, from 1819 down to the time of the trial.

The plaintiffs proved, by two of the trustees, that no records of the school district, previous to 1846, could be found; and the records of the district, from 1846 to the time of the trial,

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were offered in evidence, from which it appeared the plaintiffs were trustees of the district, and it was admitted by defendants' counsel that plaintiffs were acting as trustees of the district when this action was commenced.

The plaintiffs then gave in evidence a deed, dated December 29, 1812, from Henry A. Townsend and others, to four persons, "Trustees of Bath School," for the premises in question, with habendum clause to them and their successors in office forever, with covenant of warranty; and proved that the premises described in the deed were the same mentioned in the complaint.

Defendant moved for nonsuit, which was denied, and they excepted. The defendants then gave in evidence a quit-claim deed, dated October 8, 1824, from Henry A. Townsend to the trustees of the school district, of the premises in question, containing a clause that the premises should be forever used for the purpose of a school-house.

The plaintiffs recovered; and defendants appealed.

Francis Kernan, for defendants, appellants;—Insisted that the evidence wholly failed to prove title, incorporation or possession.

D. Rumsey, for plaintiffs, respondents.

BY THE COURT.—HUNT, Ch. J.—The first objection to the recovery in this case is based upon the allegation that the plaintiffs have not shown themselves to be a corporation. It was admitted upon the trial, by the defendants' counsel, that when this action was commenced, the plaintiffs were acting as trustees of school district number five. It was found that the records of the school district, prior to 1846, could not be found. Since that period the records show a continued action and succession of trustees of the district No. 5. The defendants themselves introduce a deed from Mr. Townsend, dated as early as the year 1824, in which a conveyance was made of the premises in question to three persons designated as "Trustees of School District No. 5, in the town of Bath." The statute of April 9, 1795 (3 *Greenl. L. N. Y.* p. 252), and of 1812 (1 *Rev. L.* 1813, p. 258), provided for the division of

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towns into districts, and the election of separate trustees. The deed of December 29, 1812, was made to Dugald Cameron and others, "Trustees of Bath School." The deed of 1824, as already stated, was to the "Trustees of School District No. 5, in the Town of Bath." I think other facts sufficiently show that the district has been divided, and a new corporation, as the successor in part of the old one, organized into the district termed No. 5.

Bearing in mind not only the existence of corporations by presumptive rights, but the statutes quoted above, there is sufficient ground for presuming the existence of the corporation in question, especially as against simple trespassers.

It is also objected that the plaintiffs established no title to the premises.

The action was commenced in February, 1859. The defendants, and those under whom they claimed, had been in possession for about ten years, with no pretense of title. It is apparent that the plaintiffs claimed to own, and actually occupied these premises, under a claim of title, based upon the deed of 1812. The deed of 1824 may be fairly assumed to have been given in aid of the title under the former deed, and was given to the trustees of this district. Under the title thus derived, whether effective or insufficient, this district occupied the premises, and maintained an actual occupation, until the fire in 1849. The earlier deed may leave some doubt as to the claim of this particular district, as it was made to the trustees of Bath school, generally. The deed of 1824, however, specifies this particular district, and from that time until 1849—a period of twenty-five years—this same district claimed to own under this deed, and actually possessed the premises in question.

This establishes a title in the plaintiffs, and authorizes the recovery in their behalf.

The deed of 1824 conveys the premises "as a site for a school-house, and for no other purpose." If this is a condition, and if it has been violated, that is a matter of no consequence to the defendants. It is between the parties to the deed or their representatives only. No others can allege a breach of the condition, or take advantage of it. Trespassers

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can acquire no right under such a claim, *Welch v. Silliman*, 2 *Hill*, 491. Whether the plaintiffs acquired a title under this deed, I have not considered. As a claim of ownership, under which a possession for a sufficient length of time will ripen into a title, and without reference to the condition, it is undoubtedly available.

The judgment should be affirmed, with costs.

All the judges present concurred.

Judgment affirmed, with costs.

 ROLKER v. GREAT WESTERN INSURANCE
COMPANY.

September, 1866.

Reversing 8 *Bow.* 222.

An ambiguous policy of insurance is to be construed liberally in favor of the insured.

A marine policy, insuring A. & Co., "on account of whom it may concern for outward shipments and homeward, to be for account of themselves and to be consigned to them by invoice and bill of lading,"—*Held*, on a view of the whole policy, not to mean outward shipments on account of whom it may concern, and homeward shipments only when made by invoice and bill of lading, and for account of themselves; but to include shipments on account of whom it may concern, whether outward shipments (approved by the insurers under another clause of the policy) or homeward shipments on account of the insured, or homeward shipments consigned to them on account of whom it might concern, by invoice and bill of lading.

The word "consigned" implies agency, not ownership in the consignee.

Under an open policy, reciting payment of premium at a specified rate, but providing that the premium on each risk is to be fixed at time of indorsement, according to the rates of the company when the character of the vessel and time of sailing are known,—if the insured, on giving timely notice of a shipment, state all the facts, the circumstance that the vessel was out of time does not exonerate the insurers; but it is for them to object on that account, and require the proportionate premium.

August Rolker and others, constituting the firm of Rolker, Mollmann & Co., sued the Great Western Insurance Company

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in the New York superior court on a policy of marine insurance.

The material part of the policy was as follows: the words which were written being here indicated by italics. "By the Great Western Insurance Company, *A. Rolker, Mollmann & Co., on account of whom it may concern, for outward shipments and homeward, to be for account of themselves and to be consigned to them by invoice and bill of lading.* In case of loss, to be paid to *them.*" Do make insurance and cause to be insured, lost or not lost, at and from *New York, to port or ports in the West Indies, and vice versa. Also at and from St. Domingo to Philadelphia and Boston. On specie and merchandise, or either, etc. . . . No outward shipment to be considered insured until approved and indorsed on this policy by this company. . . . Homeward shipments to be reported as soon as ascertained. . . . Also to cover such other risks as may be approved and indorsed on this policy. . . . It is agreed that this policy shall also cover shipments consigned to A. Rolker, Mollmann & Co., and addressed to Veure A. Merentie & Co."*

The plaintiffs' correspondents at Port au Prince shipped a quantity of coffee belonging to themselves by the brig Delafield of New York, consigning it under invoice and bill of lading to the plaintiffs as their factors for sale. The brig sailed for New York, December 21, 1856. On the 6th of February following the plaintiffs received advice of the shipment, and communicated the fact to the company, with a request to have it entered as a risk under the policy, which, however, the company refused to do, but without assigning a reason.

The vessel was never heard from.

At the trial the complaint was dismissed, on the ground that the plaintiffs were not interested in the coffee shipped by the Delafield, otherwise than that the same was coming under consignment to them, and that the policy did not cover such homeward risk.

The superior court, at general term, affirmed the judgment on the ground that the words in the policy, "on account of whom it may concern," applied only to outward shipments, and that the policy covered only such homeward shipments as

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were owned by Rolker, Mollmann & Co. The court did not pass on the question whether these goods could be covered by the clause in relation to goods consigned to A. Rolker, Mollmann & Co., and addressed to Veure A. Merentie & Co., as these goods were not so addressed.

Plaintiffs appealed to this court.

W. F. Allen, for plaintiffs appellants.—The fact that the ship had sailed on the homeward voyage before the insurance was effected, did not exclude the shipment from the benefit of the policy. *Barr v. Gibson*, 5 *Mees & W.* 390; *Paddock v. Franklin Ins. Co.*, 11 *Pick.* 227; 1 *Phil. on Ins. Pl.* 925, p. 518, 4 ed.; *Coggeshall v. Am. Ins. Co.*, 3 *Wend.* 283. The intention of the parties is to be sought in the contract itself, and effect is to be given to this intent. *Aquilar v. Rogers*, 7 *S. R.* 421; *Robertson v. French*, 4 *East* 135; *Hoffman v. Aetna Ins. Co.*, 32 *N. Y.* 405; *Goix v. Low*, 1 *Johns. Cas.* 341; 1 *Phil. on Ins.* 82. The whole policy must be taken together. 1 *Phil. on Ins.* 84; *Holmes v. Charlestown Fire Ins. Co.*, 10 *Metc.* 211; *Ward v. Whitney*, 8 *N. Y.* 442; *Norton v. Woodruff*, 18 *N. Y.* 363. The policy is to be construed most strongly against the insurer. *Broom Leg. Max.* 254, *et seq.*; *Mayor v. Isaacs*, 6 *Mees & W.* 612; *Edis v. Bury*, 6 *Barn. & C.* 433; *Miller v. Thompson*, 4 *Scott N. R.* 104. The terms of a promise being doubtful must be construed in favor of the promisee, especially in contracts of insurance. 1 *Phil. on Ins.* 211, and case cited above; *Potter v. Ont. & Liv. Mut. Ins. Co.*, 5 *Hill*, 149; *Black v. Bull*, 1 *M. & Rob.* 169.

William M. Evarts, for defendants, respondents.

BY THE COURT.—LEONARD, J.—The question in this case turns upon the right interpretation of the language of the policy. The sentence occurring at the beginning, in which the interests to be covered are sought to be described, is badly constructed, and some alteration of punctuation or language is necessary in order to make it accurately express the meaning which either party seek to attach. Are the words “and to be consigned to them by invoice and bill of lading,” to be con-

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strued so as to diminish or enlarge the remedy of the plaintiffs under the policy, in the case of loss by the perils insured against on homeward shipments?

The meaning attached to this sentence by the plaintiffs requires it to be read as if three separate kinds or description of shipments were included, and that it should read, in effect, as if constructed in the following manner; "The Great Western Insurance Company insure A. Rolker, Mollman & Co., on account of whom it may concern, for outward shipments, and homeward shipments for account of themselves, and shipments consigned to them by invoice and bill of lading."

This reading maintains the punctuation as it occurs in the policy, or, at least, requires no alteration in it, and drops the words "to be," which are twice used in the sentence.

The reading insisted on by the defendants requires a change in the punctuation so as to place the comma after the word "shipments," and claims all that follows the word "homeward" to have been used as a description or qualification of the interests insured, and requiring such interests to be for account of the plaintiffs, and also to be such as are consigned to them in a particular manner only, viz., both by invoice and bill of lading.

The latter reading confines the liability of the company, even in the case of the actual ownership of the shipments by the plaintiffs, to the form of the indicia of ownership, as manifested by the bill of lading and invoice, and makes the words "to be for account of themselves," not only as a qualification or description of the "homeward shipments," but also to prevent the application of the words, "on account of whom it may concern," to any part of the latter portion of the sentence. It in effect excludes consignments to the plaintiffs for sale, or of which the plaintiffs are not the actual owners, from the operation of the policy.

The defendants urge, as a reason for the construction insisted on by them, that, as to outward shipments, whether for account of the plaintiffs or other parties, the company retained control, in its power of approving or rejecting a shipment, while, as to homeward shipments, this power not being re-

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tained, it was essential to limit the risks which they were willing to assume to such goods as were actually owned by the plaintiffs, and were accompanied by certain indicia.

It was clearly to the defendants' advantage so to limit their risk; but the question is, have they done so? The stipulation in the policy, that the rate of two per cent. on the whole sum of \$50,000 which they had been paid, was nominal, and that the premium on each risk was subject to additions and deductions to conform to the rates of the company, when the character of the vessel and the time of sailing should be known, appears to be a sufficient protection, and the exercise of a sound discretion under this clause to be more in conformity with the interests and the practice of insurance companies, than the exclusion of a whole class of marine risks, which are ordinarily considered desirable at suitable rates. The provision of the policy, that homeward shipments are to be reported as soon as ascertained, carries a strong suggestion that shipments of an unknown or unexpected character, such as consignments for sale, would be made. It is apparent that the reason suggested by the defendants is not at all conclusive.

It is also urged, by the defendants, that the provision "to cover such other risks as may be approved and indorsed on this policy" must have been added in reference to homeward shipments for account of consignors which the plaintiffs might desire to insure, and which the company might see fit to cover. This argument would have more force if the policy were not limited to voyages between the West Indies and New York, and St. Domingo and Philadelphia and Boston. The plaintiffs might have other homeward consignments from ports in South America, or various other foreign ports, which the parties might agree upon insuring, and to which this clause might as well refer, as to the subject suggested by the argument.

The clause in reference to consignments to Rolker, Mollman & Co., addressed to Veure A. Merentie & Co., is also referred to as strongly maintaining the position of the defendants. It must be observed, however, that such consignments are not homeward shipments consigned to the plaintiffs by invoice and bill of lading, and not, therefore, within the description of in-

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terests covered by any interpretation contended for under the first clause of the policy. It required the special clause inserted on this subject, in order to cover shipments so made, without a new special agreement after they had been ascertained and reported.

It is said, also, that the clause "on account of whom it may concern" applies only to outward shipments, because such application satisfies their use, and the other words, "for account of themselves," as limiting the class of homeward shipments, would be utterly insensible. This argument assumes that there are only two descriptions of interests covered, and that homeward shipments only are included when they are for account of the plaintiffs exclusively. An interpretation which admits that the policy covers three classes of interests, viz: shipments outward, homeward for their own account, and on consignment by invoice and bill of lading, will make the whole harmonious, and free from any antagonistic force requiring one clause to defeat or impair the sense of the other.

The words "for account of themselves," by such a construction, are relevant to describe a class of homeward shipments, and leaves the former clause to its unrestricted signification.

A construction which will give an unlimited and customary signification to every part of a contract is to be preferred.

It is also said that at the time the risk was notified to the company, it was not insurable except at a rate of premium adjusted to the fact of the vessel being out of time.

It is not in evidence what is the usual time of a sailing vessel from Port au Prince to New York; but, assuming that the Delafield was out of time, it was incumbent on the defendants to take the risk, in "conformity to the rates of the company, when the character of the vessel and time of sailing are known," pursuant to the terms of the policy providing for such a case.

The defendants, when the shipment was ascertained and they were notified of it, and applied to for the purpose of entering it on the pass-book as an admitted risk under the policy, refused to do so, and refused to give any reason for their refusal. The plaintiffs gave all the facts in their notice—the name of the vessel, when and where built, and the time of

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sailing. There was no deception, no attempt to impose on the company as to the facts. If the vessel was out of time it was for the company to mention it, and claim its rights as to the premium. The plaintiffs appear to be in no fault in this respect.

These were all the considerations urged at the argument of this appeal by the learned and very able counsel for the defendants, to sustain the restricted construction which saves the company from liability for the loss of the shipment by the Delafield.

The shipments was consigned to the plaintiffs by invoice and bill of lading, and although it was not the property of the plaintiffs, there are sufficient considerations, in my opinion, to hold the risk to be included within the intent of the parties, and the meaning and terms of the contract.

The custom is well understood that factors insure the property of their consignors, both against marine risks while in transit to them, and against fire while in their custody. The factor has an insurable interest in both cases. But in the present case the plaintiffs procure general words to be inserted in the policy, "for account of whom it may concern," which will cover their own property, and that which they have an interest in as factors only, and obtain the further stipulation, that in case of loss it is to be paid to them. Had the defendants intended the restricted signification now insisted on, they would have employed much more definite terms. The policy should read that the company insure "homeward shipments which are for account of themselves and consigned to them by invoice and bill of lading," if they intended so to limit their liability. The company have employed words which are capable of a more favorable reading for the insured, and they should be held to have extended the most liberal meaning of which the language is reasonably susceptible, as it was chosen by themselves.

As before remarked, the words "on account of whom it may concern" are not inconsistent with the words "for account of themselves," when the latter words are considered as merely words of description applying to the homeward shipments; using the words "to be consigned to them by invoice or bill of

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lading" as descriptive of another class of shipments, not for account of the plaintiffs, the former stipulation, making the policy for account of whom it may concern, again becomes operative and important. The word "consigned," in its commercial sense, carries a decided implication that the property consigned is not the property of the consignee. The invoice carries no necessary implication of ownership. It is well understood that an invoice usually accompanies goods that are consigned to a factor for sale as well as in the case of a purchaser.

A fair and liberal construction of the language of the policy includes the coffee consigned to the plaintiffs and shipped by the Delafield; and in my opinion, the judgment should be reversed and a new trial ordered, with costs to abide the event.

A majority of the judges concurred.

Judgment reversed and new trial ordered, costs to abide the event.

ROME EXCHANGE BANK v. EAMES.

December, 1864.

It is a rule in equity, not affected by the Code of Procedure, that a party must recover according to the case made by his complaint, or not at all; *secundum allegata* as well as *probata*. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleadings and evidence.*

A trust of real and personal estate, providing for the payment of debts, and reserving the income of the surplus for the use of the grantor, is valid as against subsequent creditors, at least as to the real property, after the personal property has been appropriated.†

A deed of trust, for the payment of the grantor's debts generally, should be confined to debts existing at the time when the deed was made. A debt subsequently originating is not entitled to payment out of the trust estate.

* But compare *Hale v. Omaha N. Bk.*, 49 N. Y. 626.

† See *Graff v. Bonnett*, 81 N. Y. 9.

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Plaintiff brought this action in the supreme court, against Sarah Eames and Charles P. Kirkland, to obtain, from trust property in the hands of Kirkland, satisfaction of a judgment recovered by plaintiff against the Manchester Manufacturing Company, of which defendant Eames was a stockholder.

The facts, as alleged in the complaint, and found by the judge, were: On September 3, 1833, Mrs. Sarah Eames executed a deed of assignment of a large amount of property, both real and personal, to Kirkland and one Walter S. Eames, in trust for certain purposes, thus expressed: "1st. To pay all my just debts of every description," the intent and object of this clause being fully to secure the payment of all the "*debts due from me*, of whatever nature the same may be." 2nd. To pay the expenses of the trust. 3rd. To invest the balance, and from the net income thereof, and such further and other sums as may be necessary, to provide for her reasonable support and maintenance during her life. 4th. At her decease, to distribute all that remains of the property conveyed, and its proceeds, to heirs named.

This deed was duly delivered to the trustees, who entered on their duties, and out of the transferred property paid the *debts* of Mrs. Eames, so far as they were then ascertained.

Upward of four thousand dollars now still remained in the hands of Kirkland, the surviving trustee, under the trust, and for the purposes expressed in the deed. Before and at the time of making the trust deed, Mrs. Eames owned three thousand and eighty-two dollars of the stock of the Manchester Manufacturing Company, and it never was transferred by her to said trustees on the books of the company, but continued to stand in her name till the company was dissolved, August 8, 1854, at which time the plaintiffs were creditors of the company to the amount of over three thousand two hundred dollars. Plaintiffs, as such creditors, lately brought an action against Mrs. Eames, to recover so much of that debt as equalled the amount of stock held by her in said company, and, in December, 1855, recovered judgment against her for three thousand one hundred and thirty-eight dollars and fifty-eight cents; and after execution unsatisfied thereon, plaintiffs requested the trustee to pay the judgment, and he refused

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so to do. Mrs. Eames owed no other debts, and was under no pecuniary obligations save said judgment.

2. The judge further found, that the Manchester Manufacturing Company was organized as a corporation, under the manufacturing corporations act of March 22, 1811; that all the property held by defendant, Sarah Eames, passed to the trustees in the deed of trust, at its date; that her indebtedness at that time exceeded the amount of her personal property; that the property still remaining in the hands of the trustee did not equal in value the real estate that passed by such deed; that there was a perpetual annuity of two hundred and fifty dollars charged upon the trust property then remaining, payable to St. Stephen's Church, subject to which the trustee held the funds; that the trust property then amounted, of personal, to about four thousand seven hundred and fifty dollars, and of real estate, to about six thousand dollars; and that the persons named in the trust deed, for whom provision was there made, were some of them living, and some were infants.

The judge found, as conclusions of law: 1st. That the complaint assumed the validity of the assignment from Mrs. Eames to defendant. 2nd. By the trust deed, Mrs. Eames became divested of all interest in the trust property, and the entire title passed to the trustees, subject to the trusts, first, to pay the debts then existing; second, to apply the income to the support of Mrs. Eames during life; third, remainder to her children and heirs. 3rd. The debt for which this action was brought did not exist at the time of executing the trust deed, but accrued in 1854, on the dissolution of the company. 4th. It was not, therefore, within the purpose of the trusts contained in the deed. 5th. There was, therefore, no equitable reason why the capital of the trust funds, in equity belonging to the children and heirs of Mrs. Eames, should be applied to its payment.

Plaintiffs excepted "to each and to every one of the findings of fact, and of the findings of law by the court, and to each one separately."

The judge ordered the complaint dismissed, with costs. Judgment entered accordingly, was affirmed by the court at

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general term. Plaintiffs appealed. Pending the appeal, Mrs. Eames died.

F. Kernan, for plaintiff, appellant.—As to the plaintiffs' right to payment out of the trust estate, cited *Slee v. Bloom*, 20 *Johns.* 669; *Rosevelt v. Brown*, 11 *N. Y.* 148; *Worrall v. Judson*, 5 *Barb.* 210; *Corning v. McCullough*, 1 *N. Y.* 47; *Stanley v. Stanley*, 13 *Shep.* 191; 10 *Eng. L. & Eq.* 171. Otherwise the deed would be void as to creditors. *Barney v. Griffin*, 2 *N. Y.* 365; *Goodrich v. Downs*, 6 *Hill*, 438; *Leitch v. Hollister*, 4 *N. Y.* 211; *Nicholson v. Leavitt*, 6 *Id.* 51. The deed was void as against plaintiffs' judgment. Cases above, and *McLean v. Britton*, 19 *Barb.* 450; *Fiedler v. Day*, 2 *Sandf.* 594; *Mackie v. Cairns*, 5 *Cow.* 547; *Grover v. Wakeman*, 11 *Wend.* 187; *Bramhall v. Ferris*, 14 *N. Y.* 41.

C. H. Doolittle, for defendant, respondent;—As to the point that the debt was not within the deed, cited 1 *Murd. Chancery*, 433, ed. of 1817 (p. 554, ed. of 1822); 1 *Hill on Trustees*, 339, 357; *Pratt v. Adams*, 7 *Paige*, 615. And see 20 *Johns.* 683; 11 *N. Y.* 156; *Young v. Winter*, 81 *Eng. Com. Law*, 399 (16 *C. B.* 401); *Boorman v. Nash*, 17 *Eng. Com. Law*, 73 (9 *B. & C.* 145); *Yollop v. Ebers*, 20 *Eng. Com. Law*, 655 (1 *B. & Ald.* 698); *Ford v. Andrews*, 9 *Wend.* 312; *Mechanics', &c. Bank v. Capron*, 17 *Johns.* 467; *Doolittle v. Southworth*, 3 *Barb.* 79; *Hill on Trustees*, 357. That under the pleadings plaintiffs could not recover. *Kelsey v. Western*, 2 *Comst.* 506; *Bailey v. Rider*, 6 *Seld.* 363, 370; *Thomas v. Austin*, 4 *Barb.* 265, 272, 273; *N. Y. N. Protective Ins. Co. v. National Ins. Co.*, 20 *Id.* 473; and see 2 *Seld.* 179, 236. That having set up the deed, plaintiffs could not object to its validity. 1 *Seld. Notes*, 15; *Ontario Bank v. Root*, 3 *Paige*, 478, 481; *Green v. Morse*, 7 *Barb.* 332; *Pratt v. Adams*, 7 *Paige*, 615. If the deed were valid Mrs. E. had no interest under it which plaintiffs could reach. *Hill on Trustees*, 362-3; 1 *Comst.* 122; 5 *Paige*, 319; 1 *R. S.* 729, §§ 60, 79; *Hill on Trustees*, 231 (marg. p.); *L'Amanran v. Van Rensselaer*, 1 *Barb. Ch.* 34; *Noyes v. Blake-man*, 2 *Seld.* 567; 1 *R. S.* 730, §§ 63, 82; *Id.* 729, §§ 60, 79; *Van Epps v. Van Epps*, 9 *Paige*, 237, 240; *Clute v. Bool*, 8 *Id.*

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83; *Hawley v. Jones* (Justice BRONSON's opinion), 16 *Wend.* 165; *De Graw v. Clason*, 11 *Paige*, 137. That the deed was valid. 1 *R. S.* 728-9, § 55; 2 *Seld.* 567; 9 *Paige*, 237, 240; 7 *Id.* 272; *Burr. on Ass.* 2 ed. 442, &c.; 22 *Wend.* 483, 494, 495; 1 *Smith*, 9, 96, 123-4.

WRIGHT, J.—The general exception in the case, if it raises any legal question to be reviewed here, is the single one, whether the plaintiff's judgment against Mrs. Eames is a *debt*, within the provisions of the trust deed, which the defendant Kirkland is bound to pay in the execution of the trust. Points, it is true, are now made that the deed is fraudulent and void as to the plaintiffs, creditors of Mrs. Eames, and that in any view it was error to dismiss the complaint, as she had a valuable equitable interest in what remained of the trust property, which the plaintiffs were entitled to; but in the complaint there was no allegation or pretense that the trust deed was for any reason fraudulent or invalid, or that Mrs. Eames had any interest in the trust property applicable to the payment of the plaintiffs' debt, nor were there any facts found, or legal conclusions of the court, to which exception was taken, bringing up either point for review. The plaintiffs treat the trust deed as valid in their complaint, not seeking to impeach it, but claiming the benefit of it as creditors of Mrs. Eames, within the scope of the trust; and the judgment demanded is, that the trustee pay the plaintiffs' debt out of any trust funds in his hands, or transfer sufficient of the property to pay it. Instead of alleging in the complaint that the trust deed was void as to them, or intended to defraud creditors, the plaintiffs claimed a beneficial interest under it, and the pleading was not framed to reach any equitable interest of Mrs. Eames, if she had any, but to obtain payment of their debt from the funds or estate remaining in the hands of the trustee, on the ground that it was provided for in the deed. It is a rule in chancery, not affected by the Code of Procedure, that a party must recover according to the case made by his complaint, or not at all; "*secundum allegata*," as well as "*probata*." No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not

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charged, although they may be apparent from some part of the pleadings and evidence. *Kelsey v. Western*, 2 *N. Y.* 500; *Ferguson v. Ferguson*, *Id.* 360; *Bailey v. Rider*, 10 *Id.* 363; *Thomas v. Austin*, 4 *Barb.* 265; *New York Central Ins. Co. v. National Protection Ins. Co.*,* 20 *Id.* 473. If it be, as is claimed, that the deed was void as against the plaintiffs' judgment, for the reason that it was a conveyance by Mrs. Eames of her property in trust for her own use, or that it was made to hinder, delay, and defraud her creditors, these matters should have been alleged. Not being alleged in the pleading, no proof of them could properly be received, and no judgment predicated upon them. *Chautauque County Bank v. White*, 6 *N. Y.* 236; *Bailey v. Rider*, *supra*. Most clearly, when a party claims the benefit of a trust conveyance, treating it as valid in his complaint, and nowhere seeking to impeach it, he is not entitled to any relief on the ground that it is void or fraudulent, or intended to defraud creditors; and this is so, although it may appear to be fraudulent or void on the pleadings and evidence. *Ontario Bank v. Root*, 3 *Paige*, 478.

In *Bailey v. Ryder*, a judgment creditor sought to have certain lands applied in payment of his demand, on the ground that the purchase of them was in trust for the benefit of Ryder, the judgment creditor. The answer asserted, and the evidence showed, that the purchase and investment made were not for the benefit of Ryder, but for his children. The complaint had gone solely upon the ground that the judgment debtor was the equitable owner of the lands, they having been purchased by his direction and with his money, and the title taken and held for his use and benefit by two other defendants. This being disproved, and the trust shown being not for the judgment debtor but for his children, the plaintiff attempted to shift his claim for relief, contending that the investment of the sum of fifteen hundred dollars by the judgment debtor, although in trust for his children, was intended to defraud his creditors then existing, or that should thereafter exist; that it was in the nature of a voluntary conveyance to defraud creditors, and was, therefore, void as to such creditors. But this court said

* But see reversal, in 14 *N. Y.* 85.

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that a sufficient answer to this was that the plaintiff had made no such case by his bill. The court say: "There is no allegation or suggestion in the bill that the investment made by Ryder for the benefit of his children was voluntary or fraudulent as against his creditors. The only point which the bill attempts to put in issue in respect to these lands is whether or not the purchase of them was in trust for the benefit of Ryder; there is no allegation that if the character of the transaction was, in fact, nominally as set up by the defendants, that it was fraudulent. . . . If his (the plaintiff's) rights depended upon the fact that the purchase and investment for the benefit of the children of Ryder were fraudulent as against him, it should have been so alleged, for it is an invariable and universal rule of the court of chancery to found its decrees on some matter put in issue between the parties by the bill and answer. . . . It makes no difference whether the defendant has, by way of avoidance, set up a distinct and independent fact, or merely denied the matters alleged in the bill. If the existence and truth of the facts thus set up by a defendant be controverted, the defendant must prove it, and the complainant may examine witnesses to disprove it; but when the fact set up by a defendant is made out, either by proof or the admission of the complainant, and destroys his title to relief, it is not admissible for the complainant, after the fact is made out, to impeach it on a ground not taken in his bill, and on a ground not arising from the issue between the parties.

"If the complainant's rights depended upon showing that the creation and execution of the trust for the use and benefit of the children of Ryder was voluntary and fraudulent as against him, his course was plain. He should have amended his bill and stated the facts on which he meant to impeach it. The defendants would have been required to answer such facts, and, if denied, it would then have been competent to have supported the allegations by proof. The rule is explicit and absolute that a party must recover in chancery according to the case made by his bill, or not at all."

The doctrine of this case is in harmony with the law as it now exists, the Code providing that "the relief granted to the

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plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but, in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." *Code of Pro.* § 275. In the present case, the only relief that could have been granted "consistent with the complaint and embraced within the issue" was to direct the payment of the plaintiff's judgment by the trustee as being a debt provided for in the trust deed itself. A decree setting aside the deed on the ground that it was fraudulent or void as against the plaintiffs, that they might subject the property in the hands of the defendant Kirkland to the payment of the judgment, would have been utterly inconsistent with the case made by the complaint, and wholly without any issue raised by the pleadings.

Looking, therefore, at the matters charged, the issues raised and tried, the facts found, the legal conclusions of the judge, and the exceptions to such conclusions, as has been stated, the only point for our consideration is whether the debt of the plaintiff was within the provisions of the deed of trust, which, in the performance of his duty, the defendant Kirkland was bound to pay. If it was not, the complaint was properly dismissed. On the contrary, if it was, as the trustee had sufficient of the trust property in his hands to pay it, the plaintiffs were entitled to judgment. The dismissal of the complaint, it is true, was not excepted to; but, as the judge evidently based his decision on the ground that the debt for which the action was brought did not come within the purpose of any of the trusts contained in the trust deed, if he was wrong in this, the error should lead to a reversal of the judgment.

Now, was the debt in suit embraced within the trust? The deed was executed and took effect on September 5, 1853. It conveyed all the property, real and personal, of Mrs. Eames to the defendant Kirkland and Walter S. Eames (since dead), subject to certain trusts. Amongst these, and primarily, was to pay her just debts of every description, including those specified in the schedule annexed to the conveyance, and any others due from her not thus specified. This was undoubtedly a trust for the payment of all debts of the grantor contracted at

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the time of making the deed. The deed provided for no future debt, and the trustee was bound, by the terms of the trust, to pay only such debts as the grantor owed when the deed was executed. Where a deed of trust is made for the payment of debts, it extends only to debts contracted at its date. 1 *Madd. Ch.* 554; *Hill on Trustees*, 339, 357. The plaintiff's debt had no existence for more than twenty years subsequent to the creation of the trust, and then only became a debt against Mrs. Eames by force of the statute. She happened to be a stockholder in the Manchester Manufacturing Company at the time of its dissolution in 1854, which company then owed the plaintiff a debt, for which she became individually liable, the statute providing "that for all debts that shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the extent of their respective shares of stock in the said company, and no further." *L.* 1811, § 7; 1 *R. L.* 245. Can this, then, be said to be a debt entitled to payment out of the trust estate, according to the terms of the deed of trust? It seems plain to me that it is not. It had no existence when the deed was executed, in any shape or against any one. The bank itself was not organized until long afterward. If it did not exist, Mrs. Eames could neither have owed it or been liable for it; certainly owed no liability of any kind to the plaintiffs, who, as well as the debt, then had no existence. The fact that Mrs. Eames, when the trust conveyance was executed, was a stockholder in a company authorized to contract debts in the future for which she might be liable by the law of the land, did not make her then owe such future debts. That she then owned stock in the company created no liability, contingently or otherwise. The statute liability is upon those persons only who compose the company at the time of its dissolution. If the week before the dissolution Mrs. Eames had disposed of her stock, it will not be pretended that any liability would have attached to her in respect to the plaintiff's debt, or any other debt due and owing by the company. The fact that she held the stock of the company when she executed the trust deed has no bearing whatever on the question of her liability. A stockholder is not the guaran-

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tor of debts which the corporation may contract, nor is there any contract on his part, express or implied, to be responsible for its debts. It is only for a particular class of liabilities of the corporation, and upon a certain class of stockholders—those being such when it is dissolved—that any personal responsibility is imposed. The plaintiff's debt against the company became a debt against Mrs. Eames when the company was dissolved by force of the statute, not before.

If, then, at the time she executed the trust deed she was in no sense liable for or owed the plaintiffs the debt in question, there is no ground for claiming that it was a debt provided for in such conveyance. It is absurd to assume that the trust embraced the payment of a demand or liability that had no existence at its creation, and when it depended altogether on a contingency in the future whether the grantor would ever become bound, and that contingency entirely under her control.

If it were conceded that liabilities, contingent or otherwise, are provided for by the deed, it must be liabilities existing when the conveyance was executed, and for some existing thing, and to some one who could be secured. It should be at least such a demand as would entitle a party, under the provisions of the English bankrupt act, or our insolvent laws, to a share in the insolvent or bankrupt estate. There was no demand or liability in this case which could be proved under the bankrupt or insolvent laws, or on which any portion of the bankrupt or insolvent estate could be paid, when the deed was executed, or for more than twenty years afterward. *Young v. Winter*, 16 C. B. 401; *Boorman v. Nash*, 9 Barn. & C. 145; *Yallop v. Ebers*, 1 Barn. & Ad. 698; *Ford v. Andrews*, 9 Wend. 312; *Mechanics' & Farmers' Bank v. Capron*, 17 Johns. 467; *Doolittle v. Southworth*, 3 Barb. 79; *Hill on Trustees*, 357.

Our statute provided that a discharge under the insolvent laws should be a bar to all debts of the insolvent, whether due or to become due, which existed at the time of the insolvent's assignment; yet in *Ford v. Andrews*, *supra*, it was held that the demand of the accommodation indorser of the insolvent's note, due before the assignment, for money paid on the note

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after the discharge of the maker was obtained, was not barred by the discharge. So, also, it was held in the *Mechanics', &c. Bank v. Capron*, *supra*, that when the insolvent was indorser on a note not due when his petition was filed, his discharge was no bar to an action on the indorsement after he had been properly charged as indorser. Both of these cases are manifestly stronger than the present one. There was a debt in existence; a creditor to deal with; an amount fixed to be liable for; and the insolvent had contracted, on a certain contingency, to be liable for a definite and existing debt. Here there was nothing of the kind at the date of the trust deed. It is impossible to conceive of a debt, demand or liability in respect to which it cannot be stated to whom it was owing, in whose favor it was incurred, what it was for when it was contracted, and when it matured. Yet none of these things could be stated in regard to the debt in suit at the execution of the deed. It became the debt of Mrs. Eames long afterward, not upon any contingent liability existing at the time of such execution, and subsequently becoming absolute, but because the statute had declared that the persons owning the stock of the Manchester Manufacturing Company at its dissolution should be individually responsible for the debts *then* due and owing by the corporation.

It cannot, therefore, be insisted, upon any reasonable construction of the deed of September, 1833, that the plaintiff's judgment is a debt within its provisions which the trustee is bound to pay out of the trust property. That deed only provided for the payment of existing liabilities. The debts are to be paid *pro rata*, and it manifestly was not intended that the trustee should wait twenty years before he paid them, to see if some debts should not be contracted by the manufacturing company which it would be unable to pay. Had there not been sufficient assets to pay conceded debts, the trustee would not have been justified in retaining any funds to pay debts like the plaintiff's that might possibly accrue on the dissolution of the corporation in an insolvent state. That is not the meaning of the deeds nor is the trust so expressed. It is expressed in these words: "To pay all my just *debts* of every description." "The intent and object of this clause being

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fully to secure the payment of *all debts due from me* of whatsoever nature the same may be." What debts? Manifestly the debts contracted and owing by the grantor when the deed was executed, and no other. This is the legal construction, and there is no language extending the trust to the payment of liabilities of Mrs. Eames other than those then incurred and owing by her. Certainly a debt that she should subsequently contract or be made liable for by statute is not within the terms of the trust. I think, therefore, that the judge was right in the conclusion that the plaintiff's debt, not existing at the time of the execution of the trust deed, but accruing in 1854, upon the dissolution of the company, did not come within the purpose of any of the trusts contained in such deed.

This disposes of the appeal upon the ground on which the action was presented by the pleadings, and tried in the court below, viz: assuming the trust deed to be valid, and claiming that the plaintiff's judgment against Mrs. Eames was a liability provided for by it. As the debt in suit was not a debt within the provisions of the deed, no case was made entitling the plaintiffs to a judgment in their favor. Were the question, however, presented by the case, whether the plaintiffs were entitled to have the deed set aside and the property subjected to the payment of their judgment, on the ground of fraud, or because it was a conveyance of personal estate reserving a use or benefit to the grantor, I should entertain an opinion adverse to the plaintiffs. Instead of being made with intent to defraud the creditors of Mrs. Eames, a primary object of the conveyance was to provide for the payment in full of all her debts. The plaintiffs were not her creditors at the time of the assignment, and there could have been no fraudulent intent respecting them. The statute condemns alienations of property made with intent to defraud creditors. As against them only it is declared the conveyance or assignment shall be void. 2 R. S. 137, § 1. The plaintiffs, therefore, not being the creditors of Mrs. Eames when the conveyance or transfer was made, were not in a position to assail its validity on the ground of fraud. But it is claimed that the deed is void as against the plaintiffs, by another statute. This statute declares that "all deeds of gift,

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all conveyances, and all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." 2 R. S. 135, § 1. The conveyance of 1833 was of the real and personal estate of Mrs. Eames, and after providing for the payment of her debts out of the trust property, in terms reserved the income of the surplus and as much of the capital as should be required for her maintenance and support during her life. Because that this *use* was expressed in the deed, it is insisted that as against the plaintiffs, her *subsequent* creditors, it is void; and this without regard to any fraudulent intention. To this, various answers may be made. First, the conveyance was of both real and personal estate, and the former is not within or condemned by the statute. The trust as to the real estate, which constituted the bulk of the transfer, is unquestionably valid. Second, the statute only avoids conveyances, &c., of personal estate which are wholly to the use of the grantor. Third, if it were held to apply to transfers made for other objects, but containing a residuary interest or partial use for the debtor, the whole grant would not be void, but only so much of it as is not sustained by the valid purposes for which it was made. The meaning of this statute (sometimes called the statute of personal uses) was fully considered in *Curtis v. Leavitt*, 15 N. Y. 9. It was there held that it applies only to conveyances, &c., wholly or primarily for the use of the grantor and not to instruments for other and active purposes, when the reservations are incidental and partial only; that if it can be applied to instruments executed for real and active purposes, such as to secure debts or procure money on loan, it avoids only so much of the grant as is not sustained by the valid purposes for which it was made. It does not avoid the entire instrument which contains the invalid use.

The judgment of the supreme court should be affirmed.

INGRAHAM, J.—The justice before whom this case was tried found that the debt due to the plaintiffs, for which this action was brought, did not exist at the time of the execution of the trust deed in 1833, but accrued in 1854. The complaint does

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not aver that the trust deed was illegal, but asks to have the debt paid out of the property in the hands of the trustees, on the allegation that Mrs. Eames, the grantor, was the holder of the stock on which the liability arose. It must, therefore, be considered as assuming the validity of the trust, and asking to be paid by the trustees on account of the presumed liability, from her being the owner of the stock at the time of the conveyance, or on the ground that the stock passed to the trustee by the conveyance, and therefore he was liable.

There can be no difficulty in disposing of the first ground, by the statements that no doubt existed at the time of the trust deed from Mrs. Eames to the plaintiffs. It is true she owned the stock then; and if the debt had been due then from the company to the plaintiffs it would have been provided for under the trust deed, but the debt was not created till nearly twenty years after the assignment was made. There was no liability existing at the time of the execution of the deed, and none for which the trustees could have been called on for payment. The deed was not intended to cover, and did not provide for, any not then existing indebtedness, and not for debts to be incurred twenty years thereafter. It is idle to say that Mrs. Eames was then liable for a debt which was not contracted, and for which the principal debtor, the company, were not liable, and which had no existence till twenty years thereafter.

I think it is clear that the debt is not one contemplated by the trust deed, or one which the trustees could have paid out of the trust funds without violating the terms of the trust; and it is equally clear that there could be no relation back to the original liability of Mrs. Eames as a stockholder, so as to cover debts contracted by the company long after the trust deed was executed. It is, however, urged that the trustees are liable, as the owners of the stock under the trust deed, and as such owners they are indebted to the company.

I do not think the plaintiffs can now claim against the trustees to recover for them, on the ground that they were the owners of the stock, and therefore liable. They have established, by their judgment against Mrs. Eames, that she was the owner. If the trustees were the owners of the stock, their

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liability should be enforced by an action at law, and not by a proceeding in equity. The whole claim here is based upon a judgment against Mrs. Eames. There is no proof that the trustees held any stock at the dissolution, nor any evidence sufficient to charge them with any indebtedness as such trustees. The whole theory of the complaint is, that the trustees are liable, as such, for a debt due from Mrs. Eames, and not for a debt due from themselves.

It is suggested that the debt should be paid out of the income belonging to Mrs. Eames under the trust deed. The complaint does not contain the allegations necessary to make out such a claim, and, even if it did, I think there is no reason for allowing it in this case. The whole title to the property was in the trustees, subject to the trusts. The provision for her support was personal, not assignable, and not subject to debts subsequently incurred, and even that has ceased by her death.

The judgment should be affirmed.

DENIO, Ch. J.—1. A person free from debt may make a settlement of his estate for the benefit of his family, by conveying to them the whole interest, to take effect in possession immediately, or the reversion, to commence in possession at his death. So, if by the same deed he make a provision for the payment of all his debts out of the property settled, so that creditors are not and cannot be hindered and delayed. The beneficiaries named, other than Mrs. Eames, took a vested estate in reversion by this deed. The nominal consideration of one dollar raised a use, and made it a good deed of bargain and sale, and vested the reversion immediately in the beneficiaries.

2. The fact that Mrs. Eames was a stockholder in the Manchester Manufacturing Company did not disable her from making the settlement. It is not possible that she could be considered a debtor until the plaintiffs' debt was contracted, if she could be at any time before the dissolution of the company; and there is no pretense that the debt on which the judgment was recovered was contracted prior to the conveyance to Kirkland and Eames. The case is very much like that

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of one entering into a copartnership, and committing the active management to the other copartners or to an agent. There is in such a case a liability to have debts contracted, which would render the new acting copartner a debtor, but he does not become such until a debt is actually contracted. Every person is liable to contract debts, and may create agencies under which debts binding him may be contracted, but until he has done so, or a debt has been actually contracted, he cannot make a conveyance which will be fraudulent against creditors, if he is under no other liability.

3. The plaintiff cannot, therefore, reach the the interest of the persons upon whom the reversion was settled. I have said that the estate of the beneficiaries, other than Mrs. Eames, was a vested estate; and I think it was such. If, however, it was contingent, on account of what is said respecting the law of descents and distribution which should be in force at Mrs. Eames' death, it would make no difference in my conclusion as to the validity of the deed. A person may create a contingent future estate as well as one vested in interest, if there is no illegal suspense of the power of alienation. The fact that there might be changes in the persons of the beneficiaries before the taking effect of the reversion in possession, does not prevent the vesting, the rule being that if there be persons in existence in whom the estate would vest in possession if the preceding estate should now terminate, the latent estate is a vested one.*

4. The remaining question is, whether the plaintiff is entitled to sequester the rents and profits payable to Mrs. Eames during her life, to satisfy its judgment. In determining this, we must consider the subject as wholly real estate. It originally consisted of both real and personal, but the latter has been appropriated to the payment of debts provided for in the trust deed. There is no direction in the deed to convert the real into personal, and the doctrine of equitable conversion has, therefore, no application. The securities now in the hands of the defendants are the proceeds of real estate sold, and are, therefore, so far as this question is concerned, to be considered

* See *Sheridan v. House*, in this volume.

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real. At common law, I have no doubt that a conveyance of one's estate to trustees, reserving the income to the grantee for life, would render that income subject to the pursuit of creditors. It is against general principles that one should hold property, or a beneficial interest in property, by such a title that creditors cannot touch it. But our statute expressly permits such arrangements, where there is a valid trust, under the fifty-fifth section of an article concerning uses and trusts. It declares that no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of, such interest, &c. 1 *R. S.* 730, § 63. This is not limited, like sections 18, 19, in the statute respecting the jurisdiction of the court of chancery, to trusts proceeding from another person. If the beneficiary cannot directly dispose of his interest, it is plain that he cannot, by contracting debts, put it in the power of another person to take and convert it so as to deprive the beneficiary of it. I have elsewhere stated what I conceive the motive of this peculiar exemption to have been; but that whatever the system was upon which it was enacted, the courts are bound to execute the will of the legislature. *Graff v. Bonnett*, 31 *N. Y.* 9. I am of opinion that the rents and profits of this trust property can no more be reached than the capital.

5. It has been argued, that inasmuch as this stock in the manufacturing company passed to the defendants, the trustees, by the trust conveyance, the other trust property should be chargeable with this debt. Passing by other objections which might be urged against this view, it is enough to say that the plaintiff has no judgment against the trustees. He has elected to consider Mrs. Eames as the stockholder who is liable for the debt, and is therefore estopped from taking the ground that the trustees were the stockholders.

It follows from what has been said that the judgment of the supreme court is right, and ought to be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

RORABACK v. STEBBINS.

December, 1866.

A judgment confessed by a married woman is not void, but voidable merely; and her husband, if he assented to the sale of property on the execution thereon, is estopped from afterwards claiming it adversely. After sale of personal property on execution issued on a voidable judgment, whether the property actually belonged to the judgment debtor or to another, a tax, subsequently levied on the debtor, constitutes no lien on the property, and a purchaser of the property at the tax sale acquires no title.

Henry Roraback sued Almas Stebbins, in the supreme court, to recover the value of a barouche sleigh, of which the plaintiff claimed to be the owner, taken and converted by the defendant. The material facts appearing on the trial were as follows: One R. D. Cornwell and Harriet Cornwell (wife of one James Cornwell), were partners in the livery business at Homer, in the county of Cortland, and, as such, were the owners of certain real and personal property. Harriet Cornwell claimed to be the owner of the sleigh in controversy, and both plaintiff and defendant substantially claim title thereto through her. The plaintiff's claim is based upon these facts. Harriet Cornwell being indebted to R. D. Cornwell, on April 12, 1856, confessed a judgment to him for a sum of eighteen hundred dollars.

Harriet Cornwell and her husband occupied a house in the town of Homer, until the month of July, 1857, when they removed to the town of Moravia, Cayuga county. They left this sleigh, together with other sleighs, in the barn, on the premises they had rented and occupied in the town of Homer, and they also left some furniture in the house they had occupied on the same premises. R. D. Cornwell afterward issued an execution upon his judgment, and on June 29, 1857, levied upon this sleigh and other property, as the property of Harriet Cornwell, the defendant in the execution. At the time of the levy by the sheriff, James Cornwell, the husband of Harriet, was present and turned out the property. The sale took place on July 25, 1857, and at the sheriff's sale the plaintiff bid off the sleigh for the sum of one hundred and five dollars. The sleigh was left in the barn, and not moved. One Randall, who owned



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the premises, and had rented them to Cornwell and his wife, and had resumed possession of the same, on their abandonment of the premises, which was before the sale, was present at the sale. The plaintiff, when he bid off the sleigh, asked Randall if he could leave it in the barn, and he told him he could, and it remained there until taken away by the tax collector in January, 1858. The plaintiff did not pay the sheriff the amount of his bids; but it appeared that there was an open account between the plaintiff, and Cornwell, the plaintiff in the execution, and on August 16, Cornwell, as such plaintiff, receipted the amount of the plaintiff's bid on the back of the execution.

The defendant claimed title to the sleigh, under the following circumstances:

On August 18, 1857, the assessors of the town of Homer, in said county, assessed the said firm of R. D. Cornwell & Co. in the sum of thirteen hundred dollars, as the value of their real estate, and in the sum of one thousand dollars, as the value of their personal property, upon which assessment the supervisors of said county levied and imposed a tax of twelve dollars and ninety-three cents; and on December 12, 1857, the said board of supervisors issued their warrant to the town collector of said town of Homer, commanding him to collect the amount of said tax, and in case of default to levy the same by distress and sale of the goods and chattels of the persons so assessed. By virtue of this warrant, the collector, in January, 1858, seized the sleigh in question and advertised it, and sold it at public auction, and it was bid off by the defendant for the sum of thirteen dollars and seventy cents, that being the highest sum bid for the same, and the sleigh was delivered to him.

The court charged the jury that the defendant, Almas Stebbins, acquired no title to the sleigh in question, by virtue of his purchase thereof at the tax sale; that the only question in the case for them to determine was, whether the plaintiff or Richard D. Cornwell purchased the sleigh in question, at the execution sale, and was the owner thereof at the time plaintiff demanded it of defendant; that, if plaintiff purchased the sleigh for himself, and he owned it when he demanded it of defendant, he was entitled to recover; but if he purchased for

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Richard D. Cornwell and as his agent, and said Cornwell owned it at the time plaintiff demanded it, the jury should find a verdict for the defendant; that plaintiff could not recover, unless the evidence satisfied the jury that he owned the sleigh. To each of these instructions defendant excepted.

The jury found a verdict for the plaintiff.

The supreme court at general term were of opinion that as plaintiff had sufficient possession, constructive or actual, to maintain either trespass or trover, the validity of the judgment was immaterial, because defendant did not connect himself with the title which the sheriff's sale sought to defeat. *Duncan v. Spear*, 11 *Wend.* 54. And they held that the tax sale was void for want of jurisdiction, and that even though the warrant were sufficient to protect the collector, this would not help the defendant, who must show title, if at all, through a valid assessment and sale.

Defendant appealed.

O. Porter, for defendant, appellant; Cited *Townsend v. Wesson*, 4 *Duer*, 342, 344; *Yates v. St. John*, 12 *Wend.* 74; *Rotan v. Fletcher*, 15 *Johns.* 207; *Rush v. Lyon*, 9 *Cow.* 52; *Kennedy v. Strong*, 14 *Johns.* 128; 2 *Bright, Husband and Wife*, 41: 1 *Comst.* 496; 3 *Hill*, 215; 6 *Id.* 534, 635; *Marshall v. Davis*, 1 *Wend.* 109, 112; *Barrett v. Warren*, 3 *Hill*, 348; *Pierce v. Van Dyke*, 6 *Id.* 613; *Nash v. Mosher*, 19 *Wend.* 431; *McDonald v. Hewett*, 15 *Johns.* 349; *Prescott v. De Forest*, 16 *Id.* 159; 2 *Grenl. Ev.* 614, 636, 637; *Schermerhorn v. Van Volkenburgh*, 11 *Johns.* 529; *Duncan v. Spear*, 11 *Wend.* 54; *Root v. Chandler*; 10 *Id.* 111; *Ely v. Ehle*, 3 *N. Y.* (3 *Comst.*) 506; *Sterns v. Patterson*, 14 *Johns.* 132; *Aikin v. Buck*, 1 *Wend.* 467, 469; *Cook v. Howard*, 13 *Johns.* 284; *Faulkner v. Brown*, 13 *Wend.* 64; *Watkins v. Abrahams*, 24 *N. Y.* 72; 14 *How. Pr.* 191; *Brunner's Appeal*, 11 *Wright, Pa.*; *Vanderheyden v. Mallory*, 1 *N. Y.* (1 *Comst.*) 452; *Yale v. Dederer*, 18 *N. Y.* 265; *Owen v. Dickinson*, 1 *Craig & Phillipps*, 48; *Borden v. Fitch*, 15 *Johns.* 122, 140; *Smith v. Shaw*, 12 *Id.* 257; *City of Camden v. Mumford*, 2 *Dutch.* 49; *Harrington v. People*, 6 *Barb.* 610; *Dobson v. Pearce*, 12 *N. Y.* (2 *Kern.*)

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156; *Pendleton v. Weed*, 17 *N. Y.* 72; *Bumstead v. Read*, 31 *Barb.* 661; *Griswold v. Stewart*, 4 *Cow.* 457; *Britton v. Wilder*, 6 *Hill*, 242; *Martin v. Divelly*, 6 *Wend.* 9; *Askew v. Daniel*, 5 *Iredell Eq.* 321; *Martin v. Mitchell*, 2 *Jacob & Walker*, 424; *Birdseye v. Flint*, 3 *Barb.* 500; *Slocum v. Hooker*, 13 *Id.* 536; reversing 12 *Id.* 563; 6 *How. Pr.* 167; 10 *N. Y. Leg. Obs.* 49; *Brumskill v. James*, 11 *N. Y. (1 Kern.)* 294; *Elliott v. Piersal*, 1 *Pet.* 328, 340; *Chemung Canal Bank v. Judson*, 8 *N. Y. (4 Seld.)* 259; *Van Alstyne v. Erwine*, 11 *N. Y. (1 Kern.)* 331; *Coffin v. Tracy*, 3 *Cai.* 129; 16 *How.* 93; 18 *Id.* 371; 5 *Seld.* 205; 2 *Kent Com.* 135, 136; *Cropsey v. McKinney*, 30 *Barb.* 47; *Dyer v. Vandenberg*, 11 *Johns.* 149; *Tuthill v. Wheeler*, 6 *Barb.* 362; 9 *Abb. Pr.* 368; 2 *R. S.* 463, 368 (4 ed. 316, 610); *Dayton's Surr.* 312; 9 *Wend.* 452, 455, 486; *Savacool v. Boughton*, 5 *Id.* 171; *Chegaray v. Jenkins*, 5 *N. Y. (1 Seld.)* 376; *Henderson v. Brown*, 1 *Cai.* 92; *Trustees of Rochester v. Symonds*, 7 *Wend.* 392; *Sheldon v. Van Buskirk*, 2 *N. Y. (2 Comst.)* 473; *People v. Supervisors of Queens*, 1 *Hill*, 195; *Beach v. Furman*, 9 *Johns.* 229; *Patchin v. Ritter*, 27 *Barb.* 34, 39.

John H. Reynolds, for plaintiff, respondent;—Cited, *Watkins v. Abrahams*, 24 *N. Y.* 72; *Buckley v. Wells*, 33 *Id.* 518; reversing 42 *Barb.* 569; *Darby v. Callaghan*, 16 *Id.* 71; *Duncan v. Spear*, 11 *Wend.* 54; *Earl v. Camp*, 16 *Wend.* 562; *Yates v. St. John*, 12 *Id.* 74; *Jackson v. Hasbrouck*, 12 *Johns.* 213.

BY THE COURT.—DAVIES, Ch. J.—[After stating the facts.—1. As to plaintiff's title to the sleigh. There is no controversy that Harriet Cornwell was indebted to Richard Cornwell, in the amount for which she confessed judgment. It was competent for her to secure payment of such indebtedness out of any property owned by her. She could mortgage, assign or convey any such property for such purpose, and divest her title thereto, and vest the ownership thereof in her grantee, or any one claiming under him.

This court held, in *Watkins v. Abrahams*, 24 *N. Y.* 72,*

* The decision below in that case is reported as *Wotkyns v. Abraham*, 14 *How. Pr.* 191.

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that a married woman could not confess a judgment, under the Code, and that such a judgment would be set aside on her motion. It was held that she was placed on the same footing with an infant, in this respect. It follows, from this, that the judgment is not void, but voidable, merely. If she elects to allow it to stand, and the title of her property, through this instrumentality, to be changed, no good reason is perceived why she may not do so. It has been repeatedly held in this court, that a married woman may effectually dispose of property, which is either hers, or treated by her husband as hers; and even that a mortgage, by the wife, of the husband's goods, was valid, he standing by and assenting to it; that the assent of the husband was only important, as estopping him from claiming the goods as his own, after permitting the wife to deal with them as hers. *Edgerton v. Thomas*, 9 *N. Y.* 40; *Sherman v. Elder*, 24 *Id.* 381; *Knapp v. Smith*, 27 *Id.* 277; *Buckley v. Wells*, 33 *Id.* 518; *Sammis v. McLaughlin*, 35 *Id.* 647. James Cornwell, the husband, is estopped from claiming the sleigh as his property. He was present at the time of the levy by the sheriff, through which this plaintiff claims, and turned out this sleigh to the sheriff, as the property of Harriet Cornwell, the defendant in the execution. He is forever precluded from setting up the contrary. There is no pretense that the title to the sleigh was in any other person. It is, therefore, very clear that the property in the sleigh was in Harriet Cornwell.

The next question is, has that title, by virtue of the judgment, execution and sale, been vested in the plaintiff? In *Miller v. Earle*, 24 *N. Y.* 110, this court held that a judgment, entered upon a confession not authorized by the Code, was good between the parties, and that, when the property of the defendant had been sold under an execution, upon such a judgment, the purchaser's title cannot be impeached by a creditor, not having a judgment or lien on the property, at the time of the levy. It was said in the opinion of one of the judges, that if the defendant in the execution chose to adopt the form of confessing a judgment, and permitting a sale of his property under execution thereon, for the purpose of paying a debt owing by him, it was not perceived that any objection

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could be taken by a party, who had acquired a subsequent judgment and lien, to such payment; that the defendant certainly would be estopped from alleging or setting up that the judgment was not valid, or, in other words, was not a judgment; and that, after he stood by and saw his property sold under an execution issued under it, and the proceeds paid over or applied upon his debt, he would be estopped from recalling such payment. Judge JAMES, in the other opinion delivered in that case, observed: "As between the parties themselves, however, the judgment confessed should be held legal and valid: that being so, the levy and sale of property under it was good, as against the defendant and all the world, except judgment creditors, existing and having a lien upon his property. Until the plaintiffs recovered their judgment against Heth (the person confessing the judgment), they had no lien upon his property. Until then, he had a right to dispose of it, or its proceeds, in payment or satisfaction of his debts, or in any other way not fraudulent."

Again: "So in this case, the debt for which the confession was given being *bona fide*, the property levied upon might have been lawfully applied by the judgment debtor, without judgment, to the payment of such debt, at any time before the plaintiff in this suit obtained any legal or equitable lien thereon; and the proceeds of such property having been applied to the payment of such *bona fide* debt, through the instrumentality of a defective judgment, before any legal or equitable lien was obtained upon it, by any other creditor, the property cannot be recalled, nor its proceeds recovered by a subsequent judgment creditor, although the prior judgment is void as to him."

A brief recurrence to the facts presented by the record will show how decisive the doctrine of this case is, when applied to that now under consideration. Assuming, for the present, that the sleigh was the property of Harriet Cornwell, then we have these controlling facts: 1. That she was *bona fide* indebted to Richard D. Cornwell. 2. That through the instrumentality of a judgment, execution and sale thereon, the proceeds of this sleigh, realized on a sale thereof by virtue of said execution, were applied in part payment of said debt. 3. That

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such sale took place, and proceeds were paid over, two days before the assessment roll for the taxes for the town of Homer was completed, that being done on the 18th of August, 1857. The tax was not levied and imposed until the annual meeting of the board of supervisors of the county of Cortland, which, in that county, takes place on the Tuesday next after the general election in each year. 1 *Elm. Stat.* 339.

No lien for this tax, upon this sleigh, assuming it to have been the property of Harriet Cornwell, was acquired until some day in November, 1857. At this time all her right and title therein had been disposed of in payment of a debt justly due and owing by her; and, on the authority of *Miller v. Earle (ubi supra)*, we must hold that the tax was no lien on this particular piece of property, and that the defendant acquired no title thereto by virtue of the tax sale.

It is now contended, on the part of the defendant, that, so far as the proof shows, the sleigh belonged to James Cornwell, the husband of Harriet Cornwell. It is not perceived how this position shows title in the defendant.

If it was the property of James Cornwell, it clearly could not be taken and sold for a tax imposed and levied against Harriet Cornwell. The tax was levied, so far as the persons were concerned, against Richard D. Cornwell and Harriet Cornwell, as composing the firm of R. D. Cornwell & Co. There is no pretense that James Cornwell was ever a member of that firm, or that any tax was levied or imposed against him or upon his property. The warrant to the collector only authorized him to seize and sell the property of the persons whose names were set down in the tax lists, and the name of James Cornwell does not appear there. If, therefore, the sleigh was the property of James Cornwell, the defendant acquired no title to it by virtue of his purchase at the tax sale. Again: this argument has no pertinency, except to establish the proposition that the plaintiff acquired no title, by virtue of his purchase, on the execution sale, on the judgment against Harriet Cornwell. But, as already remarked, James Cornwell is estopped, by his act in turning out to the sheriff this sleigh as the property of Harriet Cornwell, from hereafter setting up or claiming that, in fact, he was the owner of the sleigh. The

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defendant is in no position which justifies him in asserting the ownership of the sleigh to be in James Cornwell.

Upon the testimony adduced at the trial, the question legitimately arose, whether, at the execution sale, the sleigh was, in fact, purchased by the plaintiff in the execution, Richard D. Cornwell. The judge, therefore, properly charged the jury, that it was important for them to determine which made the purchase; for, which ever did, was the owner at the time of the demand and conversion; and that, if the plaintiff purchased the sleigh for himself, and he owned it when he demanded it, he was entitled to recover; but, if the plaintiff purchased the sleigh at the execution sale for Richard D. Cornwell, and as his agent, and said Cornwell owned it, then the jury should find a verdict for the defendant.

In all these propositions, the learned justice was undoubtedly correct. If the plaintiff purchased the sleigh for himself, and on his own account, then he unquestionably became the owner thereof, and it was a matter of no moment, whether the plaintiff in that execution required payment of the purchase-money at the time, or give him credit therefor. The important fact appeared that the defendant in that execution had credit for the amount of the bid, on the judgment against her. The plaintiff, in that judgment, was estopped from denying the fact of such payment. The jury, therefore, found, as a fact, that the plaintiff himself became the purchaser of the sleigh at the execution sale; and the conclusion of the law followed, that he thereupon became the owner thereof. The judge, also, very properly, left it to the jury to find, whether the purchase was not made by or for Richard D. Cornwell. If it had been, then he became the owner of the sleigh, and it would have been liable to seizure and sale for payment of the tax levied and imposed on him and Harriet Cornwell; and the defendant, by virtue of the tax sale, would have acquired title thereto. In such case, as the judge told the jury, their verdict should be for the defendant. But the jury ignored this view of the case, and found that the plaintiff had himself become such purchaser, and thereby the owner of the sleigh, and, consequently, entitled to recover the damages he had sustained by the taking and conversion thereof by the defendant.

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We have assumed, in the examination of this case, that the tax, and the sale thereunder, levied and imposed upon Richard D. Cornwell and Harriet Cornwell, was, in all respects, legal and regular. In the view we take of this case, we do not deem it needful to express any opinion upon that question, and we wish to be distinctly understood as expressing none. We have disposed of the case on the assumption that the tax was legal and the sale regular.

The exceptions taken to the admission of testimony are wholly unimportant and immaterial, in the light we regard this case. The only exception which had any bearing upon any important question submitted to the jury, was to the admission of proof, on the part of the plaintiff, that he had an open account with R. D. Cornwell, the plaintiff in the execution. Plaintiff, by his bid for the sleigh, the same having been accepted by the sheriff and the plaintiff in the execution, became a debtor to such plaintiff for the amount of his bid. The plaintiff, by crediting such amount on the execution, discharged the defendant therein from such sum, and was estopped from denying payment of that sum by her. For the purpose of showing a fact, certainly not very important, how the matter was adjusted between the purchaser and the plaintiff in the execution, the judge permitted the fact that there was an open account between them to be proved. It was not material or important, and its admission is no ground for a new trial.

Upon a careful examination of the whole case, I am clearly of the opinion that it is has been rightly disposed of, and that the judgment should be affirmed, with costs.

All the judges concurred, except PORTER, J., who did not vote.

Judgment affirmed, with costs.

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September, 1863.

Charitable donations of a public nature, if contingent and executory, form no exception to the law against perpetuities.

* An opinion in this case, which related to costs only, is reported in 28 N. Y., 184.

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The conferring of the naked legal title upon executors, does not prevent a bequest from being void for suspending the real ownership of the fund, contrary to the statute.

Where a primary gift, not vested, is declared void for being made contingent on an event other than the determination of one or two lives, the limitation over, dependent on the same contingency, is void also, and cannot be sustained by regarding it as accelerated and vested immediately.*

The testator gave his executors the residue of his estate, with directions that if a specified sum were contributed within five years from his death to establish a Beneficent Association he desired should be formed, the executors should pay over the residue to such association; but if the association were not formed, or the specified sum not contributed within that time, they were to pay the residue to other beneficiaries.

Held, 1. That the real ownership of the residue would thereby be suspended for a period which might be more than two lives, and therefore the primary bequest was void.

2. That the secondary bequest, since it was subsequent and depended on the same event, was also void.

Chauncey Rose, executor of John Rose, deceased, commenced this action in the supreme court, against Henry Rose and others, seeking to have the nature and extent of the rights of the parties mentioned in the will of John Rose judicially ascertained and established, and especially that certain charitable donations contained in clause 9 of said will be decided to be valid or invalid. The complaint also sought the directions of the court for the management of the estate, and as to the execution of the trusts in the will, and also for general relief.

The following is the ninth clause of the will, which was the only part drawn in question.

"9th. I give and bequeath to my aforementioned executors, all the residue of my estate, real and personal, to hold the same in trust, for the special end of encouraging and aiding to found in the city of New York an extensive beneficent association, that will provide and establish two or more farms as receptives for maintaining, educating, and employing, or apprenticing out such poor white children as may be properly controlled and placed therein; and particularly those youth who

* But an ulterior limitation which is bad may be dropped, allowing the primary bequest to stand. *Harrison v. Harrison*, 30 *N. Y.* 543. Compare *Schettler v. Smith*, 41 *Id.* 327. See *Burrill v. Boardman*, 43 *Id.* 254.

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may be compelled by cruel and dissolute parents or guardians to pilfer or beg in or about the city, believing that such an association and establishment would be means to rescue and save very many from ruin, from filling prisons and alms-houses. I do, therefore, desire and request, that whenever within five years after my decease, the sum of three hundred thousand dollars is raised from other sources for the aforesaid ends, that then said trustees do promptly transfer or pay over to such association all the said trust estate or proceeds thereof; but, in case the sum of three hundred thousand dollars be not raised, as aforesaid, within five years after my decease, then and in that event I desire and request my said trustees to give to the American Colonization Society, one half the amount or proceeds of said trust estate, and the remaining half they will please allot and give to whom or whatsoever they may deem to be the best and most worthy objects of charity."

The American Colonization Society answered to the effect that they were duly incorporated, and so entitled to take testamentary gifts—and claimed that clause 9 was valid, and that they were entitled to half of testator's residue, and to hold the same in case the bequests of the whole residue should be adjudged to be void, or in case the preliminary subscription should not be raised.

The Rose Beneficent Association of the city of New York also answered to the effect that the association was incorporated by statute, and was entitled to have the provisions in clause 9 carried into effect, and that the residuary estate therein appropriated should be paid to them, they being ready to perform all the conditions imposed on them by the testator.

The supreme court, at special term, WM. F. ALLEN, J., held that the entire disposition contained in clause 9 was invalid and void, and that neither the Rose Beneficent Association nor the American Colonization Society had any right to testator's residue under the will; but that the heirs took it as in case of intestacy, and the executor was directed to distribute the same accordingly. From the judgment entered thereon, both the societies appealed; and the judgment having been affirmed at general term, they appealed to this court.

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Alexander W. Bradford, George F. Comstock, and William Curtis Noyes, for the defendant Rose.

Theodore W. Dwight, William M. Evarts, and John A. Bryan, for the Rose Beneficent Association.

Charles O'Connor and Joseph B. Varnum, for the American Colonization Society.

BY THE COURT.—WRIGHT, J.—The magnitude of the bequest, in connection with the interesting questions supposed to be involved and which were argued with so much learning and ability, has given unusual importance to this case. It may be, also, that the purpose of the testator in the disposition of the bulk of his large estate has tended to heighten the public interest, for, independent of any peculiar law of charity, and according to the general sense of civilized society, such purpose is eminently benevolent.

The testator contemplated the foundation of an extensive charity of the description indicated in his will. But he did not propose to be sole donor and founder. On the contrary, he did not propose to contribute at all unless others engaged in the undertaking; and hence, his munificent gift was limited upon the contingency that an association should be brought into existence, and the sum of three hundred thousand dollars raised from other sources, within five years of his decease. The plain meaning of the testator in the clause disposing of the residue of his estate, is this: his executors were to hold such residue to aid thereby in founding the Beneficent Association indicated. If within five years from his decease the association should be formed, and there was raised from other sources the sum of three hundred thousand dollars, the whole of his residuary estate should belong to such association, and his executors were to pay it over. No duty or trust was enjoined upon the executors except to pay over on that contingency, and in the mean time they were to hold the funds passively. But if no association was formed, or, if formed, there should be a failure to raise the sum named from other sources, within the time specified, the residuary estate was not to be devoted to the benevolent purpose primarily contem-

plated by the testator; but one-half thereof was to go to the American Colonization Society, and the other half "to whom or whatsoever they (the executors) might deem to be the best and most worthy objects of charity."

As the testator, therefore, framed the bequest, it is contingent and executory in respect to both the primary and secondary dispositions. As to the primary disposition there is an uncertainty as to the association (which was non-existent at the testator's death), even being formed, and also as to the raising of the three hundred thousand dollars. The secondary dispositions hinge on the same uncertain event, viz: the not raising the three hundred thousand dollars. They do not take effect, nor did the testator intend they should, unless there is a failure to raise the sum within the time specified.

We are met at the threshold of our examination with the objection that the limitations, tested by our law of perpetuity, are invalid. Unless, therefore, the objection of remoteness can be avoided, it will be unnecessary to examine the question so fully discussed and still unsettled, whether the English law of charitable uses, as it existed at the adoption of the Constitution of 1777, is now the law of the State. If the dispositions are void on the ground of remoteness, the property goes to those to whom the law gives the ownership in case of an ineffectual devise or bequest, viz: the heirs and next of kin.

In determining the question whether the vice of perpetuity attaches, it is of no significance that the limitations are to what are understood as charitable objects. Charitable donations of a public nature, form no exception to the law against perpetuities; at least while they remain contingent and executory. Estates, although given to charitable uses, must vest within the time prescribed by law. This is the American and English doctrine, and I am not aware of any case to the contrary. *Phelps v. Pond*, 23 N. Y. 69; *Leonard v. Burr*, 18 *Id.* 96; *Yates v. Yates*, 9 *Larz.* 324; *Morgan v. Masterton*, 4 *Sandf.* 442. In 1 *Drury & W.* 245, Sir EDWARD SUGDEN, sitting in the Irish court of chancery, said: "Limitations over to charity do not differ from any other, and to be effectual must be confined within the usual period," and on that ground the limitation over to the charity was adjudged to be void.

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Indeed, the counsel of one of the donees in the present case, the American Colonization Society, concedes that if the bequest to the society did not vest immediately on the death of the testator, but was postponed for any period, however short, it would be void, because human life does not, as our rule against perpetuities requires, enter into the limitation.

It cannot be successfully urged that the primary legatee took a vested interest; certainly the formation of the association and the raising of the three hundred thousand dollars were conditions precedent. The executors were not to pay over the fund until the conditions were performed, which might be any time within five years from the death of the testator, and in default of performance it was to go to other beneficiaries. They were not authorized to expend any part of the estate in organizing the association, or in procuring contributions from other sources. The limitation directs them in terms to pay over "the trust estate, or proceeds thereof." It does not appear that any part of the legacy has been used for the purpose suggested; and I am clearly of the opinion that the executors were without authority to do so. They were to hold the fund, subject to the contingencies on which it was given, for the period of five years, unless the uncertain events, upon the happening of which it was to vest in and belong to the primary legatee, sooner occurred. As the testator framed the limitation and by its precise terms, the "absolute ownership" of the fund was to remain suspended, it might be for five years, or a shorter period, having no dependence upon lives. Of course the naked legal title was in the executors, by operation of law, or under the will, for the benefit of the next of kin unless effectually bequeathed to others; but the real ownership was suspended and the fund incapable of alienation for five years, unless the conditions on which the limitation was to take effect were sooner fulfilled. The fund now awaits the performance of one of the conditions, viz: the raising of the three hundred thousand dollars, and until that condition is performed it cannot be paid. This is no vested gift, but on the contrary a perpetuity, because the vesting of the gift is not made to depend on a life or two lives in being, but on an uncertain event which may not happen within five years, a period

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which cannot be substituted for lives. 1 *R. S.* 773, § 1; *Hawley v. James*, 16 *Wend.* 61; *Yates v. Yates*, 9 *Barb.* 325; *Boynton v. Hoyt*, 1 *Den.* 53; *Phelps v. Pond*, 23 *N. Y.* 69; *Morgan v. Masterton*, 4 *Sandf.* 442; *Ker v. Lord Dungannon*, 1 *Drury & W.* 509; *Lew. on Perpet.* 147, 170, 172; 1 *Jarm. on Wills*, 230, 321. The vice of perpetuity is, therefore, inherent in the primary limitation.

But how is it with the second bequest over to the Colonization Society, and other objects which the executors shall deem meritorious charities? The primary and ulterior limitations are, in terms, hung upon the same uncertain event, and it would seem to follow, that if the one involves a perpetuity, the other is affected with the same vice, and for like reasons. Taking the will precisely as the testator has written it, the secondary bequest is made to vest upon the failure to raise the three hundred thousand dollars in five years. Whether it shall ever take effect is, in terms, dependent upon the determination of this uncertainty. The primary limitation is dependent upon the event being determined one way, the secondary limitation on its determination the other way. I give, says the testator, to the first object of my regard, the Benevolent Association, all of my residuary estate, upon condition that within five years after my decease, the sum of three hundred thousand dollars is raised from other sources; but, "in case the sum of three hundred thousand dollars be not raised, as aforesaid, within five years after my decease, *then and in that event* I desire and request my said trustees to give the American Colonization Society, one half the amount, or proceeds of said trust estate, and the remaining half they will please allot and give to whom or whatsoever they may deem to be the best and most worthy objects of charity." Can there be any doubt, therefore, that the secondary gift, according to its terms, is limited upon the determination of the same event which the primary gift is made dependent, and that, taking the will as it reads, the vice of perpetuity equally affects both of the bequests? I think not. The ulterior bequest is objectionable, not merely because it is subsequent in order to one that is too remote, but because it is subsequent and depending upon the same event. The subsequent limitation, judged by itself, is too remote. I

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concede, that if the ulterior gift was, in itself, well limited, it would not be affected by the circumstance that the prior gift was void for remoteness, or any other vice; but I think it would be difficult to find a case where the ulterior bequest was void for remoteness according to its terms, and the gift was accelerated so as to bring it within the rules of law. This would be, in effect, to alter the bequest and make a new will for the testator.

The learned counsel for the Colonization Society contended, with much ingenuity, that the limitation over to the society was not of a character to be impeached for remoteness; that the right of the society to the money was fixed and inevitable from the moment of the testator's death, and that there was no length of time whatever in which the vesting of the gift to it was either uncertain or postponed. The result is reached in this way: The event, it is said, on which the bequest to the Colonization Society was limited to take effect, was a mere negative. That with the view of settling, if possible, the prior gift, the testator allowed five years for ascertaining its practicability, yet the gift over, both in expression and in intent, is limited upon the event. If such a negative can be called an event, it is to be considered as happening whenever the affirmative is legally impossible. Taking into view the state of facts and the existing law, it was, at the death of the testator, legally impossible, and, therefore, in fact impossible, that the three hundred thousand dollars could ever be raised, as prescribed by the testator; for the Benevolent Association did not exist, nor could it ever come into existence to raise it. Looking, says the counsel, at the limitation from the stand-point of the testator's death, the event on which the prior limitation was suspended could never happen; the Association did not exist, and the law would not allow it to come into existence, so that it might raise the three hundred thousand dollars, and hence, the negative of the event on which the secondary bequest was limited, is to be regarded as happening whenever the legal impossibility existed of raising the three hundred thousand dollars, which was at the moment of testator's death. An executory limitation, it is argued, to be avoided by the rule against perpetuities, must be so framed at the time of its creation as

ex necessitate not to take effect (if it takes effect at all), within the allowed period. If the limitation cannot by any possibility ever vest, the rule does not apply, and the test of its validity, under the rule, is always capable of being applied to it at the instant the instrument containing it becomes operative. In testing the validity of any disposition sought to be impeached on the ground of remoteness, we are told that the sole inquiry, is—is the limitation so framed that we can see that that it must take effect, if ever, within the prescribed period? If the event on which it is hung, be possible in the nature of things, and it be not of such a character that it must inevitably happen, if ever, within the prescribed period, it is conceded that it is void in its creation; but an attempted future limitation upon a stated event, it is claimed, is not avoided by the rule against perpetuities, but is inherently null and void, owing to the mere fact that it is incapable of ever taking effect. If, however, it can be seen at the moment of the testator's death, taking into view the state of facts and the existing law, that the gift must take effect, if ever, within the prescribed time, it is not invalid on the ground of remoteness. It is insisted that the limitation over to the Colonization Society was on the negative of an event that could not possibly ever happen within the prescribed time, for it was legally impossible that it could happen at all. Hence, the gift, being limited on the not happening of an event that it was legally impossible could happen, the right of the Colonization Society to the money was subject to no contingency, but was fixed from the moment of the testator's death.

The sum of this argument is, that the prior gift being void for remoteness, or some other vice, and out of the way, and the law rendering it impossible that that event could happen, on the negative of which the secondary gift was limited to take effect, such bequest is to be brought forward and upheld as an immediate vested gift. The argument is, I think, unsound on principle and authority. If it be correct in this case, I cannot perceive why, in any case, where there are primary and secondary limitations depending on the same event, and the law adjudges the primary limitation to be void, the secondary bequest shall not be accelerated, and made to vest immediately.

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But I think it would be a new doctrine that when the secondary limitation, according to its own terms, is more remote than the law will permit, it is brought forward if the vice of perpetuity, or some other vice, shall be fatal to and legally displace the prior limitation. In this case the prior gift was limited, upon the condition of raising, within five years, the sum of three hundred thousand dollars, and it was to take effect upon the happening of that contingency. This was void for remoteness. The posterior gift was to take effect, in case of a failure to raise such sum within five years from the testator's decease, and only on that event being determined. The intention plainly indicated by the words of the limitation is, that the latter gift is to remain suspended until the sum specified is raised, provided it be done within five years. This is a clearly expressed limitation of the gift upon a contingency. The bequest is, itself, a perpetuity without regard to the presence or absence, or the validity or invalidity, for any cause, of the prior limitation. As the testator has framed the limitations, primary and secondary, they are both condemned by our law of perpetuity. The bequest to the Colonization Society cannot be brought forward and upheld as an immediate vested gift, without, in effect, making a will for the testator, instead of expounding the one made by him. On the ground of remoteness, therefore, which affects both bequests, I am of the opinion that there has been no valid or testamentary disposition of any part of the residuary estate.

The court concurring in this view it disposes of the case without reaching the question, so elaborately and learnedly discussed, viz: whether the peculiar system of English jurisprudence, by which indefinite charitable gifts are upheld, is the law of this State.

The judgment of the supreme court should be affirmed.

All the judges concurred in respect to the primary bequest, and all but H. R. SELDEN, J., who was in doubt, as to the secondary bequest.

Judgment affirmed, and taxable costs of all parties to be paid out of the funds of the estate.

ROSEBROOKS v. DINSMORE.

March, 1867.

Reversing 4 Robt. 672.

In an action against a carrier, under a complaint which alleges that before the arrival of the goods at their original destination the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and so negligently acted that the goods were lost,—evidence that when the property had reached its destination the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, the carrier—will sustain a recovery, there being no objection taken at the trial to the variance.

An objection at the trial might be obviated by amendment.

Henry W. Rosebrooks sued William B. Dinsmore, president of Adams Express Company, in the New York superior court, to recover the value of goods shipped for plaintiff by the defendants in the fall of 1862, from New York, to a consignee (Cantwell) at Harper's Ferry, Virginia.

The allegations of the complaint material to the question of variance were as follows: The plaintiff's assignors shipped the goods by the defendants, directed to one William Cantwell, at Harper's Ferry, in the State of Virginia. That said goods were received by said Adams Express Company, and by them agreed to be forwarded to said Harper's Ferry, and the same were actually forwarded to Harper's Ferry by said Adams Express Company.

"That before the arrival of said goods at Harper's Ferry, said William Cantwell, the consignee thereof, had removed from said Harper's Ferry, of which removal said Adams Express Company was duly notified; and thereupon said Adams Express Company were duly notified and directed to forward said goods to the address of said William Cantwell, at the city of Washington aforesaid.

"That said company undertook to forward said goods to Washington as aforesaid, but instead thereof, said company so negligently acted in the premises at Harper's Ferry aforesaid, that said goods, through the negligence and improper care of

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said Adams Express Company, were wholly lost or destroyed.

“Wherefore, &c.”

Upon the trial before the referee, it appeared that a portion of the goods arrived at Sandy Hook, a place about a mile from Harper's Ferry, on the opposite side of the river, and, shortly after, the consignee demanded the goods there of the agent of the defendants, who refused to deliver them. The referee reported in favor of the plaintiff for the value, at Harper's Ferry, of the goods so demanded, with interest. Judgment was entered on the report accordingly, with costs.

The superior court, at general term, reversed the judgment, and ordered a new trial, on the ground that the evidence amounted to a variance, leaving the cause of action unproved in its entire scope and meaning. Reported in 4 *Robt.* 672.

Plaintiffs appealed.

Torrance & Spaulding, for the plaintiff, appellant;—Cited *Belknap v. Sealey*, 14 *N. Y.* 144; *Parsons v. Suydam*, 3 *E. D. Smith*, 280; *Manice v. Brady*, 15 *Abb. Pr.* 173; *Day v. Roth*, 18 *N. Y.* 448; *Stevens v. Boston & Maine R. R. Co.*, 1 *Gray*, 277.

Clarence A. Seward, for the defendant, respondent.—The gravamen of the complaint was: 1. Neglect to forward the goods from Harper's Ferry to Washington; and, 2. Negligence and improper care of the goods at Harper's Ferry, whereby the goods were destroyed,—and the plaintiff entirely failed to prove his case, and the referee has rendered judgment, not for a refusal to forward, nor for neglect of the care of the goods at Harper's Ferry, both of which charges were based upon contract, but *ex delicto*, for a conversion of some of the goods at Sandy Hook. This he could not properly do. *Bailey v. Ryder*, 19 *N. Y.* 363; *Voorhies' Code*, § 171, and cases cited in notes; *Saltus v. Genin*, 3 *Bosw.* 250; *Whitcomb v. Hungerford*, 42 *Barb.* 177; *Cowenhoven v. City of Brooklyn*, 38 *Id.* 9; *Gaspar v. Adams*, 28 *Id.* 441. But, if the case was one of

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variance, an amendment should not have been allowed without putting the plaintiff to his motion, because the variance was material, and misled the defendant.

BY THE COURT.—SCRUGHAM, J.—The gravamen of the action is the loss of the property through the negligence of the defendant.

The agent of the plaintiff's assignor had the right to demand and receive it, when he applied for it at Sandy Hook; the property was not then *in transitu*, but had reached its destination, as the contract was to convey it to Harper's Ferry, or to the defendant's agency nearest or most convenient to it. Such was Sandy Hook, and the goods could not at that time be taken farther by the defendant.

The agent of the plaintiff's assignor was authorized by the defendant's agent at Harper's Ferry to apply for the goods at Sandy Hook.

The refusal to deliver them was wrongful, and its result was their loss. The wrong would not have been committed but for the negligence of defendant in not sending a proper way-bill.

The box of candies was delivered, by mistake of defendant's agent, to the wrong persons, and lost to plaintiff's assignor.

There can be no doubt of this being attributable to defendant's negligence.

It was not claimed on the trial that the case proved varied from that pleaded; nor was any of the evidence objected to on the ground that it did not correspond with the allegations of the complaint.

If that objection had then been taken, the referee might have permitted an amendment of the complaint, and if the defendant alleged surprise, might have imposed terms to prevent it. It was late for the defendant to be surprised after report.

The order granting a new trial should be reversed, and the judgment entered on report of referee affirmed.

All the judges concurred.

Judgment accordingly.

Rouse v. Lewis.

ROUSE v. LEWIS.

March, 1866.

A buyer, having paid for chattels, to be delivered at a future day, is not bound to receive them after that day has passed, unless the delay was caused by his acts before the day, or unless he has waived punctual performance.*

The judge should refuse to instruct the jury as to the effect of a fact alleged by one of the parties, but not substantiated by any evidence.

Simeon Rouse sued Ebenezer Lewis, in the supreme court, for damages for breach of a contract to sell and deliver within a day named, two mowing machines, which at the time of contracting were in course of construction or alteration, at defendant's shop. Plaintiff paid for the mowers at the time of making the contract. The only question of fact litigated was whether they were to be delivered on June 27, as claimed by plaintiff, or on July 4, as claimed by defendant.

On the day which plaintiff claimed was the day fixed, he demanded delivery, but the mowers were not done. Thereupon he told the defendant that he should not take them afterward, whether finished or not. When the day which defendant claimed was the date for performance, the machines were finished and ready for delivery.

The testimony of the parties and their witnesses as to what was the true day was conflicting. On each side there was explicit testimony.

The court was asked by the defendant to instruct the jury "that, if they believed, from the evidence, that plaintiff notified defendant, before the time expired for altering the machines, that he would not take them, then the defendant was not in default for not getting them ready in time." This the court refused.

The jury found for plaintiff, but the supreme court set the verdict aside, and ordered a new trial.

Plaintiff appealed.

* As to notice of intent not to perform, compare *Bunge v. Koop*, 48 N. Y. 225.

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H. C. Leavenworth, for plaintiff, appellant.

Argus McDonald, for defendant, respondent,—Insisted that the judge should have charged that if before delivery of the machines, plaintiff notified defendant that he would not take them, then defendant was not in default for not getting them ready *in time*. 2 *Pars. on Cont.* 188, 189; *Dana v. Fiedler*, 1 *E. D. Smith*, 463; *Ogden v. Marshall*, 8 *N. Y. (4 Seld.)*, 340; *Vaupell v. Woodward*, 2 *Sandf.* 143; *Cort v. Ambergate Railway Co.*, 6 *Eng. L. & E.* 220; *Hochester v. De Latour*, 20 *Id.* 157.

PORTER, J.—The judgment was reversed in the court below, on the ground that the judge erred in refusing to instruct the jury, that the defendant was not in default for omitting to have the machines ready in time, if they believed that before the time expired, he was notified by the plaintiff that he would not take them. The decision was made upon the argument, the judge who tried the cause dissenting; and we think it quite apparent that the reversal was due to a misapprehension of the facts.

The contract, on the part of the plaintiff, was completely executed at the time it was made. All that he undertook to do, was done at once. He owed no remaining duty to the defendant, who received his pay in advance, for the property he engaged to deliver. The parties afterward differed as to the period fixed for delivery; but there was not a scintilla of evidence that the plaintiff ever consented to any extension of the time, or intimated either by word or act that he did not intend to hold the defendant to a strict performance of the contract. Of this the latter had no right to complain, for he admits that when the plaintiff called for the machines, and claimed that they were to have been furnished in two weeks, he refused to rescind the contract and restore the consideration, though the articles were not in readiness for delivery.

The proposition which the judge was requested to submit to the jury, was wholly unwarranted by the evidence, and could only tend to mislead them, as well in respect to the nature of the issue as to the legal effect of the proof. The parties both testified that the contract was for the delivery of the machines

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within a fixed period; and the vital and controlling question in the case was, whether the time limited for performance by the defendant was the 4th of July, as he testified, or the 27th of June, as proved by the plaintiff and his witnesses. If the 4th of July was the day, the defendant was not in default; for the proof is clear that the machines were then at the appointed place and complete, so far as they were ever completed. If the 27th of June was the day, the parties and their witnesses all agree that the mowers were then unfinished. In either aspect of the proof, therefore, the proposed instruction was irrelevant. If the time did not expire until the 4th of July, there was no default to be excused. If it expired at the end of two weeks, as the plaintiff proved, there was no testimony to warrant the assumption, either by the court or the jury, that the completion of the machines had been delayed by any such notice from the plaintiff. The bargain was made on the 12th of June, and the defendant proves that his employees gave their attention first to the manufacture of his mowers of the new pattern, and did not commence work on these until the 24th. This was the delay which retarded the delivery of the machines, but after they began the work, it was prosecuted vigorously to completion, and the mowers were in readiness on the 4th of July, which the defendant claims to have been the appointed day.

The declarations to which the proposition refers, were not made by the plaintiff until after the two weeks had expired. There was some slight confusion of dates on the part of the witnesses, as usually happens after a considerable lapse of time. This was cleared up however, by unmistakable proof. The order of the successive interviews was fixed beyond all question. It would have been the plain duty of the court to set aside as against evidence a finding that either of the declarations in question were made by the plaintiff prior to the demand of the machines on the 27th day of June. They were all of the same tenor. In each case he was complaining of the defendant's breach of contract, in not having the mowers ready at the appointed time. It was in reference to this violation of the agreement, that he declared he would not take them, even if the defendant went on and completed them afterward. There

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was no waiver of his rights under the contract, but a constant assertion of those rights. There was no pretense on the part of the defendant or his witnesses of any assent by the plaintiff to delay, or any waiver of strict performance. The parties were throughout in a position of direct antagonism, each insisting on his own version of the contract, and each standing on his legal rights under it. The issue made by them was precisely that which the court committed to the jury. If the time fixed for delivery was the 27th of June, the contract was broken, and the plaintiff was not bound to accept the machines. If the delivery was to be on the 4th of July, the agreement was performed, and the defendant was entitled to a verdict.

The appellant was right in claiming that when one of the parties to a contract, containing mutual and dependent stipulations, either prevents or waives its punctual fulfillment by the other, he cannot afterward complain of the delay to which he assented. *Young v. Hunter*, 6 *N. Y.* 203, 205; *Hassbrouck v. Tappan*, 15 *Johns.* 200. It is also true that the defendant, under an answer alleging the fulfillment of such an agreement, is at liberty to prove that strict performance was prevented or waived by the plaintiff. *Holmes v. Holmes*, 9 *N. Y.* 525. But these rules have no application to a case like the present, where the plaintiff neither waived nor prevented performance by the defendant. The only legitimate issue was that which the judge submitted to the jury. A charge in the terms of the proposed request would have been inappropriate to the facts, and fatal to a verdict in favor of the defendant. A judge is not at liberty to instruct a jury to base their findings on a hypothesis unwarranted by the evidence. *Storey v. Brennan*, 15 *N. Y.* 524.

We have examined the other exceptions taken on the trial, and we think they are all untenable. The order granting a new trial should be reversed, and judgment on the verdict affirmed.

A majority of the judges concurred.

Order reversed, and judgment for plaintiff on verdict.

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ROWAN v. KELSEY.

September, 1866.

In ejectment, by a lessee against his lessor, to recover possession of rooms demised, which the landlord has altered so as to destroy their identity, if the answer denies the allegations of the complaint, that the acts were done by force and without plaintiff's consent, and alleges that plaintiff's tenancy had ceased, evidence that he induced, or assented to, the alterations, is admissible to prove an estoppel. If such an answer be not sufficient to admit this evidence, objection to the form of the pleadings must be taken at the trial.

It seems, that ejectment lies for a room, although the walls have been so altered as to destroy its identity.

William L. Rowan sued Charles Kelsey and others, in the supreme court, in ejectment, to recover the possession of certain premises in Brooklyn, and for damages for withholding them. The complaint alleged that on February 20, 1851, the defendant Kelsey leased to the plaintiff for the term of ten years, at the yearly rent of two hundred and seventy-five dollars, premises described as follows: "All that certain room on the first floor and to the easterly end of the building, situated, &c. [designating locality and dimensions], together with the cellar under the house, of the same dimensions, and also the ground in the rear of the same, fifty feet on Sedgwick-street, and in length eighty feet."

There was in the lease a covenant on the part of Kelsey to put up in the cellar, stalls for forty horses, also bins and harness closets, and a cistern, also to make necessary repairs, and in case the building should be destroyed by the elements, or be so far damaged as to be untenable, then to rebuild or repair, the rent to cease until rebuilt or repaired.

It was further alleged that the plaintiff entered under the lease and remained in the possession of the premises until March 1, 1852, when the defendants wrongfully entered; and plaintiff demanded possession and damages.

The answer substantially denied the complaint, and averred that prior to March 1, 1852, the interest of the plaintiff in the premises ceased.

On the first trial of the case the plaintiff was nonsuited, but

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the supreme court afterward held that ejectment would lie, and awarded a new trial. Reported in 18 *Barb.* 484.

On the third trial it appeared in evidence that the part of building leased, as alleged in the complaint, was one room in the first story, eighty feet in length, and fifty feet wide, and a cellar or basement containing stalls for horses, and it was leased to be used as a stable.

On June 22, 1851, the grand jury of Kings county indicted the building as unsafe and a public nuisance. The indictment was tried in October, 1851, and Kelsey, the landlord, was convicted of a nuisance, and by an order of the court, made on November 3, he was ordered to cause the building to be pulled down. Accordingly, in obedience to the order of the court, he went into the possession of the premises, to pull down the building. He took down the front and rear walls, and took up the timber foundations. He also took down the wooden partition at the north end of the part leased to the plaintiff, and took away all the posts that supported the floors. He also cut through the floors of three stories, and then rebuilt the premises in four tenements, each containing a store, dwelling house, and back yard, and each separated from the others by a brick partition wall, carried up from the basement; and by reason of this radical change in the structure, it was claimed that all identity of the building and all fitness for use as a stable was destroyed.

The judge directed a verdict for the plaintiff, on which judgment was entered.

The supreme court, on appeal, affirmed the judgment, holding, conformably to the previous decision, that ejectment would lie, since, in their opinion, the premises had not been so altered that they could no longer be identified, and possession thereof could not be delivered by the sheriff. They also held that under the pleadings, the evidence as to the estoppel was not admissible, since the court did not regard an allegation in the answer that the plaintiff's interest had ceased, and that Kelsey had become entitled to the possession before March 1, 1852, as being an allegation of a surrender by plaintiff, either in law or in fact, before that time.

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Defendants appealed to this court.

John H. Reynolds, for defendants, appellants.—That ejectment could not be maintained. *Doe v. Burt*, 1 *T. R.* 701; *Winter v. Cornish*, 5 *Ohio*, 303; *Kerr v. Merchant Exc.*, 3 *Edw. Ch.* 315; *Graves v. Berdan*, 29 *Barb.* 100. That plaintiff's acts had amounted to a surrender of the premises. 2 *R. S.* 5 ed. 220; 1 *Washb. on Real Estate*, 357, 359; *Lyon v. Reed*, 13 *M. & W.* 285; *House v. Barr*, 24 *Barb.* 527; *Nickells v. Athurtane*, 10 *A. & E. N. S.* 946; *McKenney v.* , 7 *Watt*, 123; *Magaw v. Lambert*, 3 *Barr*, 444; *Wood v. Walbridge*, 19 *Barb.* 136.

A. J. Spencer, for plaintiff, respondent.

HUNT, J. [After stating the above facts.]—That the demise of the rooms and the cellar created no interest in the land upon which they stood, or of which they formed a part, is not open to serious question. It was expressly so held in *Kerr v. Merchants' Exchange Co.*, 3 *Edw.* 315, where the demise was of the rooms Nos. 10 and 11, in the building known as the Merchants' Exchange, which was afterward destroyed by fire. It was held that no interest passed in the land upon which the building stood. In *Winter v. Cornish*, 5 *Ohio*, 303, the demise was of a cellar and a room over it, in the corner of a building several stories high. After its destruction, by fire, the lessee entered and erected a small structure upon the site of the cellar and room, and of a height corresponding with the room demised. It was held that he took no interest in the land, and had no rights whatever after the destruction of the building by fire. A similar case was that of *Doe v. Burt*, 1 *Term R.* 701.

A more difficult question arises upon the point of the remaining identity of the demised premises. Rowan hired a basement filled up with stalls, bins and harness rooms, sufficient to accommodate forty horses, and to be used as a livery stable. He hired also a room of fifty by eighty feet in size, and a piece of land in the rear of it of the same dimensions. The room and lot were to be used as a riding school, and apparently for purposes also connected with the livery stable. It is unde-

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niable that the character of the premises has been so changed that they cannot be used in the manner or for the purposes originally intended. There is now no room of fifty by eighty feet in size, in which horses, harness, grain and carriages may be kept. What was that room is now arranged for the basement and kitchens of several dwelling houses, with the ordinary conveniences, and divided into several parts, separated by substantial brick walls. What was before the large room above it, is now divided into four stores, also separated from each other by the like substantial walls. The lessee certainly would not be obliged to accept such premises as the identical premises leased from Kelsey. He could well say that for the purposes originally intended, as well as in form, character and value, the identity of the premises was entirely destroyed. It is true that the several parts of the building had not been entirely taken out of existence, inasmuch as two of the walls, a portion of the roof, and a portion of the foundation were used in the new structure. It is equally true, however, that its character and form had been destroyed, that the front and the rear walls were new, that what was before one large stable and riding school, was now four separate and independent stores and dwelling houses, for practical purposes as much disconnected as if they were on different streets. The old materials remained in part, but in a new form and character.

How could the sheriff put the lessee in possession of the demised premises, in execution of the judgment of the court? He could find no such rooms as would be described in the judgment; he could find no livery stable or riding school. He could do it in no other way than by marking off upon the ground the original dimensions, and carrying the lines upward to the second story. This, however, bases the recovery of possession, upon an interest in the land, which I think the lessee does not possess, and entirely ignores the rooms themselves.

Does it alter the legal result, that the identity of the premises is destroyed intentionally, by the hand of man, and not by fire, by tempest or by earthquake? The question is one of identity, and not how the non-identity was produced. The lessor might well be liable in damages in the one case and not in the other, but the loss of identity would be equal in either case.

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It may be assumed, however, in this case, that the change in the building was made by the lessor, in execution of the judgment of the city court of Brooklyn, for the purpose of destruction as a nuisance, and not for the purpose of repair. It may be assumed, further, that the destruction was with the assent of the lessee, Rowan. Assuming these facts, I am of the opinion that there was not only a destruction of the identity of the premises, but it was such an one as ended the rights of the lessee in the premises, and prevented his right of recovery in the present action.

The judgment of the city court, that this building as occupied by Rowan, was a nuisance from its unsafe and dangerous character, was put in evidence without objection, as well as the order of the court directing its removal. It was proved that the rebuilding was made expressly in pursuance of the requirements of the judgment. It was also offered to be proved that Rowan told the workmen engaged upon the building that he had caused it to be torn down, that he considered his lease as at an end, and that the lessor was under no obligation to rebuild, and desired the conversation to be reported to the lessor; that it was so reported and acted upon by him, and the building was then divided into stores and dwellings, which had not been before intended. This evidence was rejected, and the plaintiff excepted. If the presence of this evidence would have aided the defendant's case, he is entitled to a new trial on account of its exclusion, and my assumption of the facts above stated is, therefore, justified, in forming a conclusion upon the case.

I am of the opinion, also, that there was an equitable estoppel upon the lessee, upon the facts proved and offered to be proved, which would prevent his recovery. It was proved or offered to be proved that the lessee was the chief instrument in instituting the proceedings and conducting the trial, which resulted in the judicial condemnation of the building; that he did this from feelings of hostility to the lessor; proof was offered that while the workmen were engaged upon the work, he reported to him that he had caused its destruction; that he considered his lease as at an end; that the lessor was under no obligation to rebuild, and desired this statement to be reported

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to the lessee; that the lessor, therefore, altered his plan, and made the building into houses and stores. It was also proved that the lessee was several times about the building while the work was going on, understood its nature and character, and made no objections to the alterations. This evidence was offered with the avowed purpose of proving the acquiescence of the lessee in the conduct and acts of the lessor, and in my opinion was competent for the purposes intended.

It is not a sufficient answer to its exclusion, that the defense proposed to be established was not pleaded. I think it was fairly within the allegation of the answer denying that portion of the complaint which alleged that the defendant entered upon the premises without the consent of the plaintiff, and held the same by force, and with a strong hand, and within the further allegations of the answer that the plaintiff's interest in the premises had ceased and determined, and that the defendant was entitled to the possession of the same; this evidence tended to prove the assertion.

But no such objection was taken on the trial, nor was the exclusion there placed upon the form of the pleadings. If that ground had been stated, an amendment to the pleadings would have obviated the alleged objection, and we are not now at liberty to deprive the party of the benefit to which he was then entitled. The evidence would have justified the jury in finding that the plaintiff had abandoned the premises; that he had given express authority to the lessor to rebuild the premises after his own judgment; that he looked on at the expenditure of large sums of money destroying his former right and possession, without dissent. A surrender of his rights or an estoppel against insisting upon them, would not be deemed unreasonable upon such a state of facts. *Dezell v. Odell*, 3 *Hill*, 215; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 *N. Y.* 392; 6 *Ad. & E.* 475; *Lawrence v. Brown*, 5 *N. Y.* 394; *Miller v. Watson*, 4 *Wend.* 267; *Tilton v. Neison*, 27 *Barb.* 595.

Whether the plaintiff could have recovered the rear lot unoccupied by the dwelling, or whether that is to be considered as an incident or adjunct to the building, it is not necessary to decide. The court ordered a recovery of the whole premises, in which they were in error, in my view of the case, as to

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the rooms and the cellar. A new trial must therefore be ordered.

The judgment should be set aside and a new trial ordered.

All the judges concurred, on the ground of the improper exclusion of the evidence as to the estoppel.

DAVIES, Ch. J., and MORGAN, J., concurred in HUNT'S opinion on both points.

Judgment reversed and new trial ordered, costs to abide the event.

ROWLEY v. THE EMPIRE INSURANCE COMPANY.

September, 1867.

The omission of the insured to notify to the insurers other insurance on the same property, as required by the policy, does not avoid the policy if the insurers had actual knowledge of the other insurance, and the insured was ignorant of it.

Notice to the agent of an insurance company who is authorized to take applications for insurance is notice to the company.

Such an agent of an insurance company, in filling up a blank application for insurance, acts as the agent of the company rather than of the applicant. And a misstatement made therein by him, which is not induced by the instructions of the applicant, does not avoid the policy.*

Amos Rowley sued defendants, in the supreme court, on a policy issued by them on June 21, 1861, insuring him for one year from June 11, 1861, for three hundred dollars on dwelling-house, and other sums on furniture, &c. The policy contained a clause making it cease and of no effect "if the said insured, or his, her or their assigns, shall hereafter make any other insurance on the same property, not consented to by the secretary in writing." Annexed to the policy as a part thereof, were these conditions: "Applications for insurance must specify the nature and amount of incumbrances, if any,—if any other insurance, the amount and what company. And any misstatement or concealment relative to any of the foregoing re-

* See *Carroll v. Charter Oak Ins. Co.*, vol. 1 of this series; *Le Roy v. Park Fire Ins. Co.*, 39 *N. Y.* 58; *Same v. Market Fire Ins. Co.*, 45 *Id.* 80.

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quirements or withholding any information affecting the hazard, shall render the insurance void, the validity of the policy being based thereon."

Plaintiff's application for this insurance stated: "I own the property, there is no incumbrance."

It appeared that the application was made out by William Dean, the agent of the defendants, and on presentation to the plaintiff was signed by him. Dean was the agent of the company under written authority, to take applications for insurance in the company, and to receive the cash percentage to be paid thereon. It appeared from Dean's testimony that plaintiff signed the application in blank, and Dean afterward filled it up and forwarded it to the company. This was a second policy and made a few days after the first had expired. It also appeared that plaintiff purchased the premises of one Roswell Goff in the spring of 1860, and paid but a part of the consideration at the time, and gave Goff a mortgage for the residue of about two thousand four hundred and thirty dollars. Dean, defendants' agent, knew at the time plaintiff took out his first policy, about June, 1860, of the existence of this incumbrance; plaintiff told him of it at the time he applied for the renewal, and at the time the present policy was issued, and plaintiff told Dean of its existence also at the time when the first policy was issued, as also when he applied for the second or present policy.

On January 29, 1861, defendants issued a policy to Goff as mortgagee upon the same dwelling-house, for the sum of three hundred dollars; the dwelling-house being valued at the sum of six hundred dollars. It may be assumed that Goff's loss had been paid.

The jury, directed by the court, gave a verdict for plaintiff for the sum claimed, and judgment thereon was affirmed on appeal.

A. B. Capron, for the defendants, appellants.—That Dean was plaintiff's agent, cited *Smith v. Empire Ins. Co.*, 25 *Barb.* 497; and see 6 *Wend.* 620; 13 *Id.* 268. That the conditions of the policy must control, in the absence of any averment of mistake. *Murdock v. Chenango County Mutual Ins. Co.*, 2

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Comst. 210; *Jennings v. The same*, 2 *Den.* 75; and see 25 *Barb.* 497; 18 *N. Y.* 390. That the false warranty avoided the policy. *Chase v. Hamilton Ins. Co.*, 20 *N. Y.* 62, and cases cited; *Jefferson Ins. Co. v. Cotheal*, 7 *Wend.* 80; *O'Neal v. Buffalo Ins. Co.*, 3 *N. Y.* (3 *Comst.*) 124; *Mead v. N. W. Ins. Co.*, 7 *N. Y.* (3 *Seld.*) 535; *Brown v. Cattaraugus County Mutual Ins. Co.*, 18 *N. Y.* 385, and cases there cited. That the parol evidence was inadmissible. *Brown v. Cattaraugus County Ins. Co. (above)*; *Ames v. N. Y. Union Ins. Co.*, 14 *N. Y.* 253.

E. H. Benn, for plaintiff, respondent.

DAVIES, Ch. J. [After stating facts and disposing of a minor question.]—It is claimed that the insurance by Goff, as mortgage of the dwelling, was a violation of that provision of the policy which declares that, in case the insured shall have any other insurance against loss by fire on the property insured, not notified to the secretary of the company, then the policy issued to the plaintiff should be void and of no effect. There are several conclusive answers to this objection :

1. The provision in the policy requiring notice to be given to the company of other insurances, relates only to other insurances by the plaintiff, and such are the express terms of the policy. Other insurance on the same property by another person is no defense, and is not a violation of this clause of the policy. *Tyler v. Aetna Fire Ins. Co.*, 12 *Wend.* 507; affirmed in *Ct. of Err.*, 16 *Wend.* 385.

2. At the time this policy was issued to the plaintiff he had no knowledge of the policy held by Goff, and he could not therefore have notified the company of its existence.

3. But the company had actual notice of the policy held by Goff at the time it issued the policy to the plaintiff on the 21st of June, 1861. Goff's policy was issued by this company on the 29th of January, 1861. And the company therefore knew on the 21st of June following, of its existence. They cannot now complain that this plaintiff did not notify them of a fact of which he had no knowledge, but of which they had actual knowledge. But the notice to Dean, the agent of the defendants, if this policy to Goff had been within the terms of the plaintiff's policy, was a sufficient notice to the company. Mc-

Ewen v. Montgomery County Mutual Ins. Co., 5 *Hill*, 101;
Wilson v. Genesee Mut. Ins. Co., 14 *N. Y.* 418.

These defendants, therefore, cannot now be permitted to set up that the policy issued by them to this plaintiff is void, because he did not notify their secretary of the existence of the policy issued by themselves to Goff in the month of January previous. Neither can they be permitted to say that it is void because the plaintiff, in his application, stated that the property was unincumbered. First, because Dean, their agent, knew it was incumbered by the mortgage to Goff, and his knowledge is notice to them. And secondly, because the defendants themselves had actual knowledge of this mortgage to Goff, as, on the 29th of January previous, they insured his interest, as mortgagee of this identical property, and subsequently paid the loss which he sustained as such. The defendants, therefore, with actual notice of this incumbrance, and after insuring the holder thereof, received the premium from this defendant, and issued a policy to him, intending, as we must assume by their subsequent conduct, in case of loss, to avail themselves of the defense that there had been a technical breach of warranty by the assured. The remarks of Judge WRIGHT in the case of *Ames v. N. Y. Union Ins. Co.*, 14 *N. Y.* 253, are pertinent to the case at the bar: "The defendants took the premium for insuring the plaintiff and issued the policy, well knowing that there had been verbal notice, but none in writing. Honesty and good faith demand that they should not be allowed to make the objection, now, that, though verbally notified of the incumbrance, for want of a written notice the policy is bad. They waived the necessity of such written notice, and, to prevent fraud and injustice, are estopped from making the objection. They took the plaintiff's money, and issued a policy to him upon verbal notice of the incumbrance, though the conditions of insurance required the notice to be in writing. They affirmed the policy to be valid without written notice, and the plaintiff acted upon such affirmation, and paid the consideration for insurance. The defendants ought not to be permitted to gainsay their acts when the effect would be to defraud the other contracting party." See also the case of *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 *N. Y.* 392.

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But how much stronger is the present case. Here the defendants seek to avoid their policy, on the ground that there was an incumbrance on the property at the time they issued their policy to the plaintiff, and he did not notify them of its existence, but, on the contrary, avowed in his application that there was no incumbrance, when, in fact, the agent of the defendant, who filled up and prepared this application, well knew of the existence of this incumbrance, and the company also knew of it, and had known of it for months previously.

They also seek to avoid it, on the ground that upon a portion of the property insured there was other insurance not notified by this plaintiff to them. That other insurance was made by this company, they had full knowledge of it, and notice from this plaintiff, even if he had known of its existence, would have furnished them no additional information. As well observed by Judge GOULD in *Bidwell v. N. W. Ins. Co.*, 24 N. Y. 302: "If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured; and to allow the company to take the premium, without taking the risk, would be to encourage a fraud. It would, as a legal principle, be equivalent to holding that a warranty of the soundness of a horse is a warranty that he has four legs, when one has been cut off." See also *Tallman v. Atlantic Fire & M. Ins. Co.**

The judgment should be affirmed, with costs.

FULLERTON, J.—If this court follows the decision in the case of *Plumb v. Cattaraugus Mut. Co.* (18 N. Y. 392), this judgment must be affirmed. That that case has changed the rule which has hitherto prevailed in this State relating to warranties in policies of insurance will be apparent by a brief reference to it. In that case, one Ide, in making out the application for insurance, acted as the agent and surveyor of the company. It was proved that he called upon Henry, the assured, with a printed blank application, and solicited him to

* Reported in this volume.

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effect an insurance with the defendants' company. Henry expressed a desire to postpone making the application, but told the agent, Ide, that if he insisted upon taking the application that day, he must get along alone, and act on his own responsibility. Ide then proceeded to make the survey alone; after which he filled up the application, and stated to Henry that it was all right, and just as it should be. Henry, without any particular examination as to the statement of the distances between, and relative situation of the buildings, told Ide that upon his representations and statements he would sign, and thereupon did sign the application, and paid the premium. This testimony was objected to, and taken under exception.

On the trial of the action brought upon the policy, the insurance company, under objection, proved that there were material errors in the survey, as to the relative positions and distances of surrounding buildings, and gave testimony tending to show that the risk was increased thereby.

The judge at the circuit directed a verdict for the plaintiffs, and, after affirmance by the general term, the judgment was appealed to this court, where it was held that the company were *estopped* from showing a breach of the warranty as to the relative situation of the buildings.

The decision was put on the ground that the insurance agent, acting within the scope of his authority, bound the principal in making the survey and filling up the application, and consequently the company could not be permitted to show that the contract was other than the writing expressed.

Mr. Justice PRATT, in delivering the opinion of the court, says: "But when the party through whose acts and representations the other party was induced to enter into the contract claims the right to show the facts were different from what he had represented them to be, for the purpose of showing a breach of the warranty, and thus avoiding what otherwise would be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of the doctrine of *estoppel in pais* as defined in the cases."

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It must be conceded that this case goes the whole length of establishing the doctrine that, although an application for insurance contains a false statement as to a material matter, the writing must still be held to express the contract between the parties, and that neither party can insist that the contract is other than what the writing expresses, provided such false statement is chargeable to the agent of the company in making the survey and filling up the application, while acting within the line of his duty.

That this is in conflict with the rule as it has heretofore existed is apparent. *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 *N. Y.* 385; *Jennings v. Chenango Mut. Ins. Co.*, 2 *Den.* 75; *Andervoot v. Smith*, 2 *Cai.* 155; *Cheriot v. Barker*, 2 *Johns.* 346; *Higginson v. Dall*, 13 *Mass.* 96, 172; *Weston v. Emes*, 1 *Townl.* 115; *Atherton v. Brown*, 14 *Mass.* 162; *Parks v. General Ins. Co.*, 5 *Pick.* 34; *Flinn v. Tabrin*, 1 *Moody & M.* 367.

This brings me to the examination of the facts in the present case.

The written appointment of the agent Dean shows that he was the agent of the defendant "to take applications for insurance in the company, and to receive the cash percentage to be paid thereon."

Acting under this authority the agent received the plaintiff's application for insurance. The manner of doing it was as follows: Rowley stated verbally to the agent the facts necessary to meet the requirements of the rules of the company, and, among other things, informed him that the premises were incumbered by a mortgage.

An application was then signed in blank by the plaintiff, and given to the agent; he promising to insert over, the signature thus obtained, the particulars thus furnished him, as a basis of the insurance, on his return to his residence.

The agent Dean was a witness on the trial of the case, and in giving the interview between himself and Rowley, at this time, says: "He (Rowley) made no objection to my taking it (the application), and filling it up at Horsehead's, if it would be all right."

The just and natural inference from this language is, that this unusual mode of doing the business was at the suggestion

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or request of the agent. But, be that as it may, for some reason unexplained, the agent, on his return, in filling up the application, inserted what was *not* the fact, and in violation of his instructions; viz: a statement that there was *no* incumbrance on the premises. The defendant now seeks to avoid its liability on the policy, alleging that this statement was a warranty on the part of the assured, and that it was false.

The appellant's counsel contends that Dean, in filling up this application, was the agent of the plaintiff, and that the company is in no wise responsible for the mistake. I am aware that he is sustained in this position by the opinion of Mr. Justice BALCOM, in *Smith v. Empire Ins. Co.*, 25 Barb. 497; but I do not think this court should adopt that rule in this case.

Considering the authority of Dean in its most limited sense, "to *take* applications for insurance," I think he must be considered the agent of the insurer rather than of the assured, in filling up the application.

His duty to his principal was to *take the application* for insurance. It cannot be said that that duty was performed when he received the blank paper signed by Rowley, because the application was then in an inchoate state.

The conditions of insurance plainly contemplate that it should be in writing, and such was the intention of the parties. When, therefore, was the duty which the agent owed the company at an end, so that he ceased to bind his principal? It is not establishing a harsh or unreasonable rule in reference to insurance companies, to hold that their agents, authorized "to take applications for insurance," are acting within the scope of their authority in everything which they do which may be necessary to complete such applications.

I must therefore regard Dean as in the act of *taking* the application when he was filling up the blank signed by the plaintiff, and therefore acting on behalf of the defendant. Any other rule would be fraught with mischief. Insurance companies send out an army of agents to solicit business. Property holders are waited upon by them at their residences, and it is not going too far to say that many of the applicants would be unable to make a proper application and survey to meet the

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rigid and elaborate requirements of these corporations, while experience shows that they are not expected to do so.

Hence, these agents render such services as are necessary, to enable the contracting parties to attain their respective objects, the one to insure and the other to become insured against fire. To hold that in performing these preliminary labors touching the very business which must necessarily be transacted before a policy can be effected, the insurance broker becomes the agent of the applicant for insurance, would seem to be an unnecessary and undesirable refinement. I repeat, that in performing these preliminary labors, the agent is engaged in *taking the application*, which is strictly within his duty, and the principal should be held responsible for any error he may commit; especially when the error consists in recording a false statement over the signature of a confiding applicant, which, it is claimed, vitiates the whole contract. Rowley, in this case, told the truth in regard to the incumbrance on the property, and in that respect discharged his duty. That satisfied the claims of morality and fair dealing, and ought to meet the requirements of the law. *Masters v. Madison County Mut. Ins. Co.*, 11 *Barb.* 624. If these views are concurred in, then the defendant, on the principle of *Plumb v. Cattaraugus Ins. Co.*, *supra*, is estopped from showing its own error to defeat its contract.

This disposes of the only question raised by the appellant's brief. Another point is made, however, in the bill of exceptions, which will be briefly considered.

It was alleged in the answer, and proved on the trial, that Goff, the former owner of the premises, had insured his interest as mortgagee in this same property, and that the plaintiff had failed to make known that fact, when he effected his policy, as he was required to do by the conditions of the insurance.

This raises a mere question of notice; and the point is met by the proof that Goff's policy was issued *by the defendant*, and the plaintiff was ignorant of that fact. *Ames v. N. Y. Union Ins. Co.*, 14 *N. Y.* (4 *Kern.*) 253.

The law is not so unreasonable as to declare void a contract of insurance on the ground that the assured did not make known the existence of a policy of which he had never heard,

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to a company which had issued it, and necessarily knew of its existence.

The judgment should be affirmed, with costs.

Judgment affirmed, with costs.

 ST. JOHN v. PIERCE.

December, 1863.

Affirming 23 Barb. 303.

The Code abrogates the provision of 2 R. S. 304, § 11, which allowed in ejectment (except when brought for dower), several persons to be named as plaintiffs, jointly in one count, and separately in others.*

A complaint framed so as to take full advantage of this section of the Revised Statutes is, under the Code, obnoxious to a demurrer, both for misjoinder of actions and misjoinder of parties.†

John Henry Herbert St. John (an infant, by Beverly Robinson, his guardian), Henry Joseph St. John and Ferdinand St. John, brought an action in the supreme court, against James Pierce, for the recovery of real property.

The complaint contained four counts. The first of these set out that on the first day of May, 1845, all the three plaintiffs were possessed of a tract of land, situated in the town of Naples, Ontario County—describing the tract—which they claim in fee; and that on the said first day of May, the defendant entered upon, and ejected the said plaintiffs from, the said tract of land, and wrongfully withholds possession thereof to

* Followed in *Hubbell v. Lerch*, 62 Barb. 295, where a demurrer was sustained to a complaint joining the assignee for the benefit of creditor with the heir of the assignor, but setting up by two distinct counts a separate title in fee in each of the plaintiffs respectively. Compare 1 Abb. Pr. 442; *Birdseye v. Smith*, 33 Barb. 217; *Sheldon v. Adams*, 13 Abb. Pr. 405.

† See as to effect of *general* demurrer, to complaint containing two counts, on the ground that an adequate cause of action was not set out in the complaint, the court holding that if either count exhibited facts sufficient to support an action the demurrer should be overruled. *Hale v. Omaha Nat'l Bank*, 49 N. Y. 626.

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the damage of the said plaintiffs of one thousand dollars. The second count stated that one of the plaintiffs' John Henry Herbert St. John, was so possessed and ejected, but otherwise this count was of the same tenor, described the same estate and premises, stated the same dates, and laid the same damages as the first count. The third count varied from the foregoing only in that it stated that two of the plaintiffs, John Henry Herbert St. John and Ferdinand St. John, were so possessed and ejected. The fourth count was couched in the same terms, except that it stated that Ferdinand St. John alone was so possessed and ejected, and except that it alone of the four, prayed judgment for the recovery of the possession of the land, with the damages aforesaid and costs, which it did in behalf of all the plaintiffs.

To this complaint the defendant demurred, assigning as grounds for demurrer that there was a misjoinder of parties therein; and that distinct causes of action were improperly joined. There were other objections specified, but the above were those upon which the defendant's counsel relied.

The demurrer was overruled at the special term.

The supreme court at general term reversed the judgment so obtained by the plaintiffs. The court, in an opinion by E. DARWIN SMITH, J., held that the provisions of the Code of Procedure (§§140, 142), in effect repealed the rule under which in actions of ejectment separate counts in the name of separate plaintiffs for the same cause of action were allowed in the same suit, as well as the rule by virtue of which in other actions, separate counts by the same plaintiffs for the same cause of action were united. 10 *How. Pr.* 161; 9 *Id.* 552. And section 167 of the Code provided that the causes of action united must affect all the parties to the action; which requirement, though met by the first count in this suit, was violated in the subsequent three counts.

That though before the adoption of the Code a declaration in ejectment, framed like the complaint in this action, would stand under the revised statutes, and though section 455 of the Code might seem to authorize the retention of the theory of actions of ejectment, as enacted in 2 *R. S.* 304, § 11; still sec-

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tion 455 of the Code is to be construed in connection with sections 468 and 471. Under these latter sections of the Code, as the provisions of the section of the revised statutes cited relate purely to the remedy, and not to the right, they must be regarded as abrogated.

The court were also of opinion that the Code substantially adopted the rules obtaining in courts of equity in respect to the joinder of parties, and that such a complaint as the one in the case at bar could not have been sustained in a court of equity before the Code.

And further that section 274 of the Code, in providing that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side as between themselves," met in all cases the need which the revised statutes (2 R. S. 307, § 30) supplied in a special case, viz., the action of ejectment.

That notwithstanding the first count, joining all the claimants as plaintiffs, would be good if it stood alone, it could not be separated from the three counts improperly joined with it, and the demurrer to the whole complaint must therefore be sustained.

Plaintiffs appealed to this court.

John H. Reynolds, for the plaintiffs, appellants.

E. G. Lapham, for the defendant, respondent.

EMOTT, J. [After stating the facts.]—That the mode of complaining or declaring which the plaintiffs have adopted in this case is expressly authorized by the revised statutes as the law stood before the Code of Procedure is conceded. 2 R. S. 304, § 11. But it is equally plain that it is in conflict with the rules prescribed by the Code, both as to parties and pleading, in respect to all actions to which those rules extend. *Code of Pro.* §§ 111, 117, 118, 119, 167. These provisions are universal in their terms, and general in their scope, and they are unquestionably intended to introduce a system by which all actions of whatever nature should be brought in the same form, and

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in the name of the real party or parties in interest, who should state his or their cause of action according to the facts. Testing this complaint by these rules, it presents four causes of action; one in behalf of all the plaintiffs, one in behalf of two of them, and two others each in behalf of a different one of the plaintiffs severally. From the claims of different and distinct ownership made in the several counts, it is clear that the four counts state distinct, and considering the fact that they all refer to the same lands, inconsistent causes of action. There is one count which states a cause of action which affects all the parties to the suit, but the others do not. On the contrary, each of the counts complains of an injury sustained by a portion of the plaintiffs only. Each is distinct from the others, stating facts in a form which would make them the ground of a separate action. The joinder of these counts in one action therefore constitutes a joinder of different causes of action not all affecting the same parties, while each count except the first states a cause of action which does not affect all the plaintiffs. There is therefore an improper joinder of causes of action, and an improper joinder of parties if the general rules of the Code apply to a suit of this nature, which before the code was known as an action of ejectment.

Section 455 of the Code enacts that "the general provisions of the revised statutes relating to actions concerning real property shall apply to actions brought under this act, according to the subject matter of the action, and without regard to its form." It is urged that this section preserves the manner of declaring or complaining allowed by the revised statutes in actions of the character of this, which I may perhaps still be permitted to call an action of ejectment; to wit, the use of several counts stating different titles, and naming the plaintiffs jointly in one, and separately in others. The general provisions of the Code as to parties and pleading to which I have referred are broad enough and explicit enough to repeal this provision of the revised statutes, unless it is retained or excepted from their scope by section 455 of the Code, just quoted. I am of opinion that such is not the effect of the latter section. I concur with the reasoning of Mr. Justice E. DARWIN SMITH, who in the opinion delivered in this case at the general term

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has ably and exhaustively discussed the whole question of the effect of the Code upon this class of suits. An action of ejectment must be brought in the form, by the parties, and according to the rules prescribed and permitted by the Code, and so brought it can accomplish all the purposes and afford fully the relief that the action in its old form ever admitted of. There are special features of the former action of ejectment, and anomalous rules and provisions belonging to it, as for instance the right of a defeated party to a new trial on payment of costs, and the proceedings to admeasure dower, where it is brought for dower, which can be and are retained and applied to actions otherwise conforming to the rules as to pleading and parties laid down by the Code. These special provisions affecting actions brought with the purpose of this, and similar special provisions in reference to other of the former actions concerning real property, are covered by section 455 of the Code, and are sufficient to give effect thereto, without construing it so as to produce an anomaly in the whole course of the action, and an exception to the rules of pleading and parties which obtain in all other cases, and which may without injustice or inconvenience, as is shown by Mr. Justice SMITH in the court below, be applied in such cases as this. I am of opinion that the judgment of the supreme court was correct, and the grounds on which it rested are sound.

A majority of the judges concurred.

Judgment affirmed, with costs.

SANDFORD v. NORRIS.

March, 1867.

One who, pursuant to verbal agreement with another, purchases land, for the benefit of the latter, and advances the price and takes a conveyance in his own name, can not interpose the statute of frauds to defeat the claim of the other to enforce the trust arising from the transaction.*

* See *Dodge v. Wellman*, vol. 1 of this series, p. 512, and *Levy v. Brush*, 45 *N. Y.* 589, reversing 8 *Abb. Pr. N. S.* 418; *Carr v. Carr*, 52 *N. Y.* 271, affirming 4 *Lans.* 314.

Sandford v. Norris.

Joseph Sandford and Sarah E. Sandford brought this action against Noah Norris and others, in the supreme court, for surrender of a bond and mortgage and an injunction against collecting them.

At the request of Mrs. Sandford, the defendant Norris agreed with her that he would attend an auction sale of the premises in which the plaintiffs lived, made by the assignees for benefit of creditors of her husband, and would purchase the premises in his own name, for her, and convey to her on being repaid his bid. He made the purchase for the sum of twenty dollars, and subject to incumbrances.

He then fraudulently took a deed in his own name; and subsequently, with the consent of Mrs. Sandford, the property was sold for two thousand dollars, over all incumbrances, one thousand dollars being paid in cash, which Mrs. Sandford received, and the remainder in a mortgage which Norris the defendant received, and refused to transfer, denying the trust and claiming that the purchase was for himself.

Judgment was rendered for the plaintiff for eight hundred and sixty-four dollars and seven cents, with interest and costs; the sum which the defendants had collected on the mortgage over and above expenses.

The supreme court, at general term, affirmed the decision of DAVIES, J., who had given judgment for plaintiffs, on the authority of *Brown v. Lynch*, 1 *Paige*, 147.

The defendant appealed to this court.

A. W. Bradford, for defendant, appellant.

S. P. Nash, for plaintiffs, respondents.

BY THE COURT.—BOCKES, J.—The defendant obtained title to the premises under an arrangement with the plaintiff, Mrs. Sandford, by which he was to purchase the property for her benefit.

In *TOMLINSON v. MILLER* (Sept. 1867), the same subject came before the court, but the court were not agreed on the merits, and ordered a new trial for error in disregarding a familiar rule of evidence. A further decision on the merits in that case is reported in 7 *Abb. Pr. N. S.* 364.

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He paid the trifling sum of twenty dollars, and within a few months afterward, sold for two thousand dollars. He allowed Mrs. Sandford to have one thousand dollars of the advance, but refused to recognize her right to the remainder, and defends this action for such balance on the ground that the arrangement with Mrs. S., under which he took the title, was void by the statute of frauds.

The circumstances attending his purchase are not obscured in the least by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violated faith; and the simple question presented to this court is, whether the fruits of his perfidy are secured to him by a law having for its object the prevention of frauds.

It stands indisputably proved that the defendant obtained this title on the pretense that he was purchasing for Mrs. Sandford, as a friendly act to her, and under agreement with her that he would take and hold the title for her benefit. Having thus obtained the title himself, he claims and insists that he is under no legal obligation to carry out the arrangement, because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him with impunity.

But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been considered open for discussion, it must now be deemed settled by the recent decision of this court in *Ryan v. Dox* (34 N. Y. 307), wherein the equitable principle is recognized as the established law of this State, that "equity will at all times lend its aid to defeat a fraud, notwithstanding the statute of frauds."

The case cited is very nearly the counterpart of this under consideration; where the defendant purchased on a mortgage sale, at an inadequate price, under an agreement with the mortgagor that the purchase should be for the benefit of the latter; and it was held that he was to be deemed the trustee of the party for whom he undertook the purchase, and that it was no objection that the agreement was not in writing. In the opinion in that case the learned chief judge has fully discussed the question, here again presented, on principle and authority, and alludes approvingly to the disposition of this

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case at general term. The cases of *Morey v. Herrick*, 18 *Penn. St.* 128, and of *Soggins v. Heard*, 31 *Miss. (2 Geo.)* 426, are also directly in point. The decision in *Ryan v. Dox* renders further consideration of this case quite unnecessary.

The judgment should be affirmed.

All the judges concurred, except HUNT, J., who dissented.

Judgment affirmed, with costs.

SANDS v. HARVEY.

March, 1865.

The act of 1862 (*L.* 1862, p. 743, c. 412), authorizing *justices* of the supreme court to refer *controversies* arising between receivers and members of mutual insurance companies, is not unconstitutional as impairing the right to a trial by jury.

The words "controversy or disagreement," as used in that act, include actions regularly commenced by summons and complaint, and in which an answer has been put in.

In such a case, the order may be made by *the court* at special term, as well as by a judge out of court.

William G. Sands, receiver of the *Ætna Insurance Company*, of Utica, sued Jonathan B. Harvey, in the supreme court, on a note given by him to the company.

George W. Sumner, for defendant, appellant.

Henry R. Mygatt, for plaintiff, respondent.

BY THE COURT.—CAMPBELL, J.—The action in this case was commenced after the passage of the act of April 21, 1862, being an "An act to facilitate the closing up of insolvent and dissolved mutual insurance companies." The objection at first raised against the act, that it was unconstitutional for it impaired or took away the right of trial by jury, has been disposed of in this court. The constitutionality of the law has been upheld. *Sands v. Kimbark*, 27 *N. Y.* 147. To the same effect was *Sands v. Tillinghast*, 24 *How. Pr.* 435.

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Section 5 of the act provides, that all actions then pending in the supreme court, at the time of the passage of the act, might be referred by the court. Section 1 provides that if any controversy or disagreement shall arise between the receiver of an insolvent or dissolved mutual insurance company, in the settlement of any claim against any member or any other person, "the same may be referred to a sole referee"—that is, any controversy or disagreement which may arise between the receiver and a member or other person, may be referred. Surely, where an action has been commenced by the receiver, and an answer has been put in denying the receiver's right to recover, a controversy has arisen both within the letter and the spirit of the act. The act provides that applications may be made for the appointment of a referee to a justice of the supreme court residing in the district where the receiver keeps his office. In this case, the order was made by such justice, but he was holding a special term of the court at the time. If the order could have been made by the justice at chambers, it would be difficult to see why he could not make it at a special term, then being held at his chambers. But this controversy, at the time the order of reference was made, had assumed the form of an action, and the action was then pending in the supreme court, which made it eminently proper that the order of reference should be made in court.

I am unable to see that any error was committed.

But the court are of opinion that the order was not appealable, and the appeal should be dismissed, with costs.

THE COURT concurred, however, in the opinion, on the merits also, and held that the order should be affirmed.*

Order affirmed, with costs.

* This appears by a reference to the minutes made on the consultation of the court; and the remittitur was therefore correct notwithstanding the remarks in *Sands v. Birch*, 19 *Abb. Pr.* 256, where the conclusion of the opinion, in favor of dismissing the appeal was thought to sanction disregarding the views expressed on the merits. It was then the custom of this court, on appeals where the merits had been argued and examined, to affirm the order if clearly correct, although at the same time they might hold the order to be not appealable.

Sands v. Shoemaker.

SANDS v. SHOEMAKER.

September, 1865.

Under the act (*L. 1854, p. 773, c. 869, § 3, amending L. 1853, § 13*),—providing that the directors of mutual insurance companies, making assessments, are to publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed,—the publication, in the absence of by-laws, is to be made according to the discretion of the directors; but where by-laws prescribe the mode of publication, their directions must be followed, and a defect therein is not aided by proof of a personal demand.*

The rule that a defendant relying on a defect of proof as a ground for a nonsuit, must make a distinct objection on the particular point,—applied to the case of an action on a premium note, without specific proof that the losses were such as the note could be assessed for.

The report of a referee in a general creditor's action, to which the receiver and the company were parties, in which an account of all the debts and assets of the company was taken, showing that the assets were insufficient to pay the debts and expenses of collection,—is sufficient evidence to sustain an assessment, as against the maker of a premium note.†

William G. Sands, as receiver of the *Ætna Insurance Company*, sued Smith Shoemaker in the supreme court, on a premium note for three hundred and twenty-five dollars, which defendant had given to that company on an insurance of one thousand dollars for three years.

He also sued Charles St. John and Nelson Birdsall on a premium note for four hundred and twenty dollars, given to the company on their organization, and payable in such portions, &c., as the directors might require. In the latter action the same note was also alleged, as a separate cause of action, as having been given for premiums on insurance.

Subsequent to the giving of these notes, one Eames was appointed receiver of the company, on its becoming insolvent, and he, by order of the court, made an assessment upon the notes, to cover losses which accrued in the hazardous department of the company's business.

* This overrules in effect *Cooper v. Shaver*, 41 *Barb.* 151.

The word "publish," in the statute, does not require newspaper publication. *Jackson v. Roberts*, 31 *N. Y.* 304, 313.

† *S. P. Jackson v. Roberts*, 31 *N. Y.* 304; *Sands v. Hill*, 42 *Barb.* 651.

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In the case of Shoemaker, the plaintiff was nonsuited on the ground that the assessments were invalid. In the case of St. John, plaintiff had judgment. The unsuccessful parties in both cases appealed.

Henry R. Mygatt, for the plaintiff in each case.

Ward Hunt, for the defendants.

DAVIS, J. [Delivered the following opinion in the case of *Sands v. Shoemaker*.]—In *Sands v. Sanders*, 26 *N. Y.* 239, the question of the validity of the assessments made by the receivers of the *Ætna Insurance Company of Utica*, was presented to, and passed upon, by this court. Upon the question whether an action could be sustained on the basis of the assessment made by receiver Eames, the court were equally divided; four of the judges being of opinion that the want of publication of notice of such assessment, in three newspapers of Oneida County, pursuant to the by-laws of the company, was fatal to a recovery. Upon this point, I concur in the views of EMOTT, J., 26 *N. Y.*, 247, 249, 250, to the effect that publication in the form prescribed by the by-laws was requisite, and that the defect in the publication was not aided by proof of a personal demand of payment of the note. The reasons assigned by him for these views are satisfactory to my mind, and will gain no strength by repetition.

But the court were united in the opinion that the assessment made by receiver Sands was, upon the facts found in that case, a valid one, and entitled the receiver to maintain his action; and for that reason the judgment was reversed and a new trial ordered. That decision is conclusive of this case, unless the facts are so essentially different that it is not applicable.

The chief differences claimed to exist are: First, that defendant's note and policy are not proved by competent evidence to be in the hazardous department; and, second, that there is no evidence that losses accrued during the existence of his policy, sufficient to require an assessment to the full amount of his note. In *Sands v. Sanders* it was found by the referee, as a fact in the case, that the note sued upon was

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in that department. Such a finding is, of course, wanting in this case, for the reason that the court nonsuited the plaintiff upon his evidence, and no facts are found. It is manifest that the fact was one easily susceptible of proof, and a reference to the grounds on which the motion for nonsuit was based shows that it was assumed by all parties to be true. This is an abundant answer to the objection in the present stage of the case. If the defendant had designed to rely on the absence of proof that his note was in the hazardous department, he should have made a distinct point on that ground, and thus have enabled the plaintiff, with permission of the court, to have supplied the defect. Not having done so, but, on the contrary, having based some of the grounds of his motion on the assumption that his note was in that department, he is too late to make any question on that subject now.

As to the second alleged difference, it seems to me that competent proof was given to establish that claims for losses existed against the company, and had been established as against the receiver, sufficient to absorb the entire assets in the hands of plaintiff. Proof was given that, in an action pending in the supreme court,* wherein Hubbard & Terry were plaintiffs, and Eames, as receiver, and the company, were defendants, an order had been made by the supreme court referring it to Joseph Benedict, Esq., in substance, to take, state and report to the court, with the proofs therein, an account of all the funds, property and effects of the company, and to take proof of and report the amount of debts due and owing by said company, or which are charges upon the assets of said company, with a statement of the consideration and cause of such debt, when contracted, and to whom payable; which order directed and provided that due notice, by publication, should be given by the referee to the creditors of said company, to come in and prove their demands before him, at a time and place to be appointed, and that all creditors coming in and establishing these claims should be deemed parties to the action, and entitled to be heard upon all questions upon which he may be interested, in the same manner as if a party to the record, and brought into court upon process.

* Some proceedings in this case are reported in 23 Barb. 597.

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The referee's report, under this order, was produced and read without objection, from which it appeared, in substance, that the claims and losses against the company established before him, were about one hundred and thirty-seven thousand dollars, and other claims seem to have been established to the amount of about seven thousand dollars.

In my opinion, the proceedings in the action of Hubbard & Terry v. Eames, sufficiently established the validity of the claims as against the company and the receiver, and it was not incumbent on the latter to go into evidence to show, in this action, that those claims were well founded. The aggregate of all the assets of the company, at their nominal value, did not greatly exceed the claims proved to exist, and, with the percentage allowed for collection, &c., were insufficient if fully available to pay the entire indebtedness. I think this evidence was not only competent, but that it proved a case requiring the receiver to proceed and make an assessment for the payment of the debts, and to assess the total amount of any note chargeable, to its entire amount for liabilities which justly attached during the existence of the policy accompanying such note. It does not, that I am able to see, distinctly appear that the losses for which the defendant's note was assessed, all accrued within the period during which his policy was running. But the dates given in the referee's report of the losses proved before him in the action above referred to, are sufficient to make a *prima facie* case on this point. They showed that the losses which accrued within the three years' lifetime of the policy, and those adjusted and allowed, or established by judgment within the period, were so large that the receiver, under the authority given him by the court, was justified in declaring that such debts, with the expenses of collection, required him to call in the whole amount of the defendant's premium note. The point is by no means a clear one, but I think the fair presumption is, from all the evidence given, that the receiver, as an officer of the court, was called upon and authorized, in the discharge of his duty, to make an assessment to the whole amount of the note.

It follows, therefore, from the principles settled in *Sands v. Sanders*, *supra*, that the judgment should be reversed, and a new trial ordered, with costs to abide event.

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DENIO, Ch. J. [delivered the following opinion in the case of *Sands v. St. John*. After alluding to the facts.]—The principal questions now involved came before this court in the case of *Sands* (the present plaintiff) against *Sanders*, 26 *N. Y.* 239. One of these questions regards the assessment made by Mr. Eames. Notice of it was published pursuant to the by-laws, except that it was inserted in only two newspapers, the by-law requiring it to be published “in three newspapers printed in Oneida county, three weeks successively,” the last publication to be not less than thirty days prior to the time fixed for payment. An act of 1854 (ch. 369, § 13) authorizes the directors of mutual insurance companies to adjust the claims for losses, and “to settle and determine the sums to be paid to the several members thereof as their respective portions of such losses, and to publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed.” The sense of this paragraph, I think, is, that, in the absence of by-laws, the publication is to be made according to the discretion of the directors, and that, where by-laws exist, their prescriptions should be followed. I concur in what was said on that subject by Judge EMOTT, in *Sands v. Sanders*. The point was not decided in that case, the judges being equally divided upon it.

Upon the questions arising upon the assessment made by plaintiff, I do not doubt that where the charter of one of these companies authorizes the division of the risks into classes, and where such a division is actually made, the notes of any particular class are applicable only to the losses upon policies in that class, and cannot be diverted to the payment of losses in another class, nor can losses in another class be paid out of the proceeds of notes taken in the particular class. It is the same thing, as regards the application of that portion of the assets, as though the policies in that class constituted the only business of the company.*

I am of opinion, moreover, that there was *prima facie* evidence in the present case, that the policy issued to the defendant was in a class called “special,” or “special department,” which was different from the classes denominated “farmers

* But see *White v. Ross*, reported in this series.

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and merchants'," and was more hazardous, and was sometimes called the hazardous class. The word "special" has reference, I conceive, to the class of special hazards, as set down in the schedules annexed to the policies generally used by insurance companies. In the case of Sanders, the fact was found that the policy for which the defendant's note was given, was in the class called hazardous; and the opinion of the supreme court assumes that this note was in the same class. The present case did not reach the stage where a finding became necessary, but there was evidence tending very strongly to show that the present defendant's note was in the class mentioned. So far as it was material to the decision, the question should have been submitted to the jury.

Assuming, then, that there was no evidence suitable to be considered for assigning the defendant's note to that class, I think the remaining questions in the case are covered by the judgment in *Sands v. Sanders*; and I refer to the opinions of the judges in that case for the reasons on which I place my opinion for reversal. I concur in those opinions, except in so far as I have expressed a different conclusion.

The nonsuit should be set aside, and a new trial ordered.

All the judges present concurred in reversing the judgment in both cases.

Judgments reversed and new trials ordered, costs to abide event.

SCHMEIDER v. McLANE.

September, 1867.

Affirming 36 Barb. 495.

A violation of a municipal ordinance is not necessarily a felony or misdemeanor, within rule 28 of the Metropolitan Police Board, and will not justify the imprisonment over night, of a person charged therewith, but he should be taken immediately before a magistrate.

Reinold Schmeider sued B. B. McLane and one Duford, in the supreme court, for false imprisonment.

Schmeider v. McLane.

A policeman of the city of Brooklyn arrested plaintiff at half past five on the afternoon of February 21, 1861, in the act of riding his horse on a sidewalk, in violation of a city ordinance; and took him to the station house and gave him into the custody of the defendants, who were the captain and sergeant, respectively, of the district; and they locked him up until next morning, when he was taken before a magistrate, and after trial, fined and discharged on paying the fine.

The defendants relied on the facts that the usual hours during which the police courts were open were from 9 to 4, and on the following general rules of the police department :

" All persons arrested at any other time than during the time the police courts are directed to be kept open, must be taken to the nearest police station. § 15."

When a person accused of having committed a felony or misdemeanor, is brought to the station house, when the police courts are not open, the officer on duty, to whom the complaint is made, is only to ascertain from the party preferring it, that the act charged is a felony or other offense for which a person can lawfully be detained, and that there is reasonable ground for the complaint against the party accused. He will then enter the name of the prisoner on the blotter, and cause him to be detained in the station house until the next morning. He will also enter the name and address of the complainant and witnesses on the blotter, and take the necessary measures to insure their appearance before the magistrate in morning. § 28. (Note to the rule. Captains, sergeants, policemen or doormen are not authorized by law to discharge any prisoner from custody.)

Plaintiff recovered.

The supreme court held that a mere violation of a municipal ordinance was not a crime within the rule allowing detention, and affirmed judgment.

H. B. Hubbard, for defendants, appellants;—Cited *L.* 1854, p. 840, § 13, subd. 10; p. 885, § 20; *L.* 1860, p. 444, § 30; pp. 437, 453, §§ 9, 58; pp. 443, 453, §§ 26, 59; 3 *Wend.* 385; 1 *Hale P. C.* 587.

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James Emott, for plaintiff, respondent;—Cited *Holley v. Mix*, 3 *Wend.* 350; *Metr. Police Act*, *L.* 1860, c. 41, § 830; § 30; *Williams v. Gleinster*, 2 *B. & C.* 699; *Wright v. Covert*, 4 *B. & C.* 596; *Broughton v. Jackson*, 11 *Eng. L. & Eq.* 386; *Burke v. Bell*, 36 *Maine*, 317; *Greenl. Ev.* §49, and cases cited.

BY THE COURT.—DAVIES, Ch. J. [Having stated the facts.] —It did not clearly appear what the penalty prescribed by the ordinance for its violation was, and it does not otherwise appear than by the fact that a fine was enforced for such violation upon the conviction of the offender. It may safely be assumed therefore, that the penalty for the violation of the ordinance was of a pecuniary character solely; if otherwise, it was incumbent upon the defendants to have shown it.

[Further reference to the above facts, and remarks as to an exception not passed on, are here omitted.]

No question is made as to the power of the metropolitan police board to make and ordain the regulations already referred to and quoted.

By section 28, a person accused of a *felony* or *misdemeanor*, when the police courts are not open, is to be brought before the captain of the police, and if he is satisfied that there is reasonable ground for the complaint, he may cause the party accused to be detained until the next morning, and it would be the duty of the sergeant of the police, having charge of the police station, to obey such order and detain the party accordingly.

But it is to be observed that this authority is conferred only in the event that the party accused is charged with the commission of a felony or misdemeanor, and the captain shall be satisfied, upon inquiry, that there is reasonable ground for the charge. In no other event or contingency is the authority for detention to be exercised. Now, there is not a scintilla of evidence in this case that the plaintiff had committed a felony or misdemeanor, or that he was charged with having committed either. It appears the charge was that in the presence and view of the complainant, Clark, he had violated an ordinance of the common council of Brooklyn, by riding his horse upon or across a sidewalk in that city. It nowhere appears, and we

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are not at liberty to assume, that this act was either a felony or misdemeanor. If it had been, it was essential to the defendants to avail themselves of the immunity and protection afforded by these regulations of the metropolitan police board, and to have shown that the charge made against the plaintiff was a felony or misdemeanor. They had no legal right or authority to detain the plaintiff in the station house upon any other charge or complaint.

The charge of the judge at the trial was clearly correct, and the judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

SCOTT v. ROGERS.

December, 1863 ; again, December, 1864.

Where a merchant directs his factors to sell merchandise on a certain day, at a fixed price, and if not sold, to ship it, the factors have no authority to make an offer, on the day named, to be accepted the next day, at the price specified.

The damages for a factor's selling in violation of instructions, may be ascertained by referring to the net market price of the goods, at a reasonable time afterward, within which to commence the action.*

What is a reasonable time, is a question of fact.

Martin B. Scott sued George W. and William T. Rogers (the latter alone answering), in the Buffalo superior court, for damages for an alleged conversion of wheat. On July 12, 1853, plaintiff, a dealer in produce in Cleveland, Ohio, telegraphed to defendants, factors in Buffalo, to sell, on that day, the wheat of plaintiff they had on storage, at one dollar and eight cents per bushel, or ship to New York, if not sold on that day for

* Compare *Burt v. Dutcher*, 34 *N. Y.* 493 ; *Markham v. Jaudon*, 41 *Id.* 235 ; *Hinde v. Smith*, 6 *Lans.* 404 ; *Lawrence v. Maxwell*, *Id.* 469 ; *Lobdell v. Stowell*, 51 *N. Y.* 70, affirming 37 *How. Pr.* 87 ; *Groat v. Gils*, 51 *N. Y.* 431 ; *Mathews v. Coe*, 49 *Id.* 57.

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that price. The same day, defendants gave to one Noye a sample of the wheat, and offered it to him at that price. Noye asked the privilege of waiting until the next morning before completing the sale, which defendants granted, provided no news should be received to change the value. The sale was made to him next morning, on his accepting the offer; but was repudiated by plaintiff, immediately upon hearing of the transaction.

The court below found that the sale was made in good faith, but was unauthorized. Plaintiff only claimed the difference between a dollar and eight cents and the price the wheat could be sold for in New York. Such wheat sold there as high as one dollar and sixty-eight cents on November 28, and for one dollar and sixty-five cents on November 29, 1853. The court held that the measure of damages was the difference between the price of the wheat as sold, and what it was worth (less expenses of keeping and sale) at a reasonable time after the sale, within which to bring the action; and fixed the latter date at November 29, 1853.

Besides general exceptions to the findings, defendants excepted to the measure of damages, claiming it should have been the difference of price between July 12 and August 2, when the wheat might have been sold in New York. They also excepted to fixing November 29 as the date.

The superior court, at general term, affirmed judgment for plaintiff. Defendants appealed.

The cause was argued in this court in October, 1863.

T. C. Welch, for appellants;—Insisted that the sale was a substantial compliance with plaintiff's intentions, citing as authorities for disregarding technical departures from instructions, *Lawler v. Keagwick*, 1 *Johns. Cas.* 174; *Drummond v. Wood*, 2 *Cai.* 310; *Parkhill v. Imlay*, 15 *Wend.* 431; *Evans v. Potter*, 2 *Gall.* 13; *Clark v. Van Northwick*, 1 *Pick.* 343; *Day v. Noble*, 2 *Id.* 615; *Geyer v. Decker*, 1 *Yeates*, 486; *Dusar v. Perit*, 4 *Binn.* 361; *Judson v. Sturgis*, 5 *Day*, 556; *Russel v. Harkey*, 6 *Durnf. & E.* 12; *Ludlow v. Simond*, 2 *Cai. Cas.* 1, 49; *Guy v. Oakley*, 13 *Johns.* 332; *Leverick v. Meigs*, 1 *Cow.* 645; *Bell*

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r. Palmer, 6 *Id.* 128; Cunningham v. Bell, 5 *Mas.* 161; 1 *Pars. on Cont.* 80.

John Ganson, for respondent;—Insisted that the failure to adhere strictly to instructions was a breach for which defendants were liable, citing *Evans v. Root*, 7 *N. Y.* 186. The authorities cited on the other point appear in the opinions.

THIS COURT held that the sale on the thirteenth, pursuant to negotiations on the twelfth, was a breach of instructions, and constituted a cause of action, *DENIO*, Ch. J., stating the reasons as follows:—This is apparently a very hard action. The defendants sold the plaintiff's wheat in entire good faith, at the price which he had set upon it. The negotiation for the sale was commenced on the day limited, and the purchase money was at the plaintiff's disposition at an early hour on the ensuing day. But it was not shown that it was according to the course of business, or necessary to the consummation of such sale, that an opportunity should be afforded to the purchaser to examine the article; and there is not anything in the circumstances, so far as I can discover, to qualify the plaintiff's precise direction, limiting the sale to July 12, and giving an alternative direction, if a sale at the prescribed price should not be effected on that day.

To a common intent, this direction looked to a completed sale on the day mentioned; and there is no circumstance shown to give the language a greater latitude. In fact, no sale was made on that day, but only an offer, which the person who became the purchaser was at liberty to accept or refuse the next morning. The sale was, therefore, contrary to the plaintiff's instructions, and the defendants became liable to pay damages for their breach of duty.

The owner of property entrusted to a factor for sale has, where the latter has no lien for advances, an absolute right to prescribe the terms of sale, and the time at which it shall be made, and a proximate compliance with instructions, though done in good faith, is not an answer to an action for damages on account of their violation.

A majority of the judges concurred in this; but the judges

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were equally divided as to the proper measure of damages,* and a reargument of that question was therefore had in September, 1864.

* The opinions on this question were as follows :

DENIO, Ch. J.—An action of trover could, no doubt, have been maintained for the conversion of the wheat. In that action, the measure of damages, generally, is the value of the property at the time of the conversion, and interest thereon to the time of the verdict. Such damages in this case would not much exceed the amount which was realized on the defendants' sale, for there was no evidence that the wheat was worth more in Erie county at the time the sale was consummated, than the price at which the defendants sold it, though there was a rise in price soon afterwards.

The plaintiff's business was one in which he sought to make gain and profits by the purchase and sale of this species of property, and it was perfectly lawful for him to elect when he would expose it to sale, and in what market; and, upon general principles, he should have redress against any one who, by an unauthorized act, has deprived him of the right to make such election.

In accordance with this principle, it has frequently been determined that the rule of damages referred to, as that generally prevailing in trover, is not inflexible. In *Greening v. Wilkinson*, 1 *Carr. & P.* 625; 11 *Eng. Com. L.* 499,—which was trover for a quantity of cotton,—it was shown to be worth six pence per pound at the time of the trial, and the defendant's counsel contended that the damages should be the value at the time of the conversion; but that direction was refused by Lord Chief Justice ABBOTT, before whom the case was tried, who said that the jury might give the value at the time of the conversion, or at any subsequent time, at their discretion, "because," he said, "the plaintiff might have had an opportunity of selling the goods, if they had not been detained. I am, therefore, of opinion," he added, "that the price of the article on the day of the conversion, is by no means the criterion of the damages. It may be said that if he had wanted cotton, he might have immediately bought more at that day's price, as soon as he found that this cotton was detained from him; but then, to do so, he must have had the money, which he might not have had ready on the very day of the detention, nor on any day after, until the price had risen; and my opinion is, that the jury are not at all limited in giving their verdict by what was the price of the article on the day of the conversion." It was a *nisi prius* case, but is still of great weight, on account of the character of the judge as an authority upon questions of commercial law.

A similar question arose in *Wilson v. Mathews*, in the supreme court of this State (24 *Barb.* 295). The plaintiff, residing in Niagara county,

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Henry W. Rogers, for defendants, appellants.

John Ganson, for plaintiff, respondent.

sent to the defendant at Oswego, a quantity of wheat, to be by him forwarded to a firm in Troy; but he, contrary to his instructions, sent seven hundred bushels of it to a dealer in New York, and the plaintiff, on applying to that person, was unable to obtain it, upon which he brought the action; but whether it was grounded upon the conversion, or for the breach of the defendant's duty as a forwarder, does not appear, and is not, I think, material. The only question was as to the rule of damages the jury having, under the direction of the judge, given the highest price since the conversion, which was two dollars and seventy-five cents per bushel; and the direction was upheld by the general term in the first district.

It has been suggested that the principle of these cases is opposed to the rule frequently laid down, that prospective and uncertain profits ought not to be permitted to enter into the assessment of damages *Masterton v. Mayor, &c. of Brooklyn*, 7 *Hill*, 61; *Blanchard v. Ely*, 21 *Wend.* 342; and see *Griffin v. Colver*, 16 *N. Y.* 489; *Hadley v. Baxendale*, 9 *Wels. H. & G.* 341.

But the price to be obtained for a given article of merchandise, if the owner shall be permitted his choice of the time and place of sale, though contingent, cannot be said to be of an uncertain and speculative character, within the sense of the distinction; and yet, under certain circumstances as will soon be mentioned, such anticipated profits cannot be recovered in a class of cases.

Before referring to a few other cases in support of the conclusion to which I have come, I should mention that the form of action, whether in trover, assumpsit, or case, does not, in general, seem to be material to the question of damages, nor does it seem important upon what title the plaintiff claims the property which the defendant has illegally withheld from him.

There is a class of cases in which the plaintiff has purchased personal property by an executory contract, but the defendant has failed to deliver it according to the exigency of the agreement, where the courts have been called upon to lay down a rule of damages, which I think analogous to the case under consideration.

Where the contract is executory on both sides, as where the price is to be paid upon the delivery of the property, the measure of the damages is the difference between the contract price and the value of the article when it should have been delivered. This is upon the assumption that with the money he can go into the market and purchase the article. In such a case, if there has been no change of price, the recovery can only be nominal. But if the price be paid in advance, and nothing remains but to deliver the goods, the reason suggested by *ABBOTT*, Ch. J., in the

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BY THE COURT.—HOGEBROOM, J. [After stating the facts].—The gist of the action is for a breach of duty in making sale of the wheat in violation of the instructions of the plaintiff,

case referred to, applies. The plaintiff may not have the ready money to make a new purchase, and cannot be fully indemnified but by being allowed any increased price which the property may be worth at a subsequent period, when, but for the fault of the defendant, he might have sold it. The case of *Leigh v. Patterson*, 8 *Taunt.* 540; *Gainsford v. Carroll*, 2 *Barn. & C.* 624, in England, and *Dey v. Dox*, 9 *Wend.* 129, and *Davis v. Shields*, 24 *Id.* 322, in this State, are examples of the first class; and *West v. Wentworth*, 3 *Cow.* 82; *Clark v. Pinney*, 7 *Id.* 681, here, and *Shepherd v. Johnson*, 2 *East*, 211, and *Greening v. Wilkinson*, before cited, in the English courts, will sufficiently exemplify the rule in the second class; and the reason of the rule will be found fully explained in several of the opinions in those cases.

The case of factors or other agents who by their wrongful acts have deprived the owner of property of his right to dispose of it, according to his own views of his interest, stands upon the same footing in this respect, with that of a purchaser by contract who has paid the price in advance. Both have an absolute right to judge whether they will dispose of it at one time or another, and if they are limited to the value at the time of the wrongful act or omission which creates the cause of action, they will in many cases fail to receive adequate indemnity for the injury.

Such is certainly the reasoning of the courts in the cases in which the question of damages has arisen, and whatever we may think of it, the principle seems too firmly established to be changed by us. So far from attempting to do so, we have recently affirmed it.

In *Romaine v. Van Allen*, 26 *N. Y.* 309, the plaintiff had pledged certain railroad stock with a bank, represented by the defendant, and it had been sold by the pledgee without demand or notice, and we held that the receiver of the bank was bound to pay the highest price which the stock would have brought on the last day of the trial, therefore that price was much greater than that which ruled on the day of the illegal sale.

The superior court of Buffalo, in the present case, acknowledged it to be a just qualification of the rule, that the action should be brought within a reasonable time, and they determined that November 29, following July 12, on which the defendant sold, was such reasonable time, and allowed the damages according to the price of wheat at that date.

We cannot say that they erred in this, should we even have preferred an earlier date.

The question as to interest does not appear to have been mentioned on the trial; no objection to its allowance is taken in the exception to the decision.

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and in converting the same to the defendants' use, resulting in the loss of the wheat to the plaintiff, and in the loss by him of large gains and profits in the sale thereof.

For these reasons I am in favor of the affirmance of the judgment.

MARVIN, J., delivered an opinion in which,—after saying that the case showed a conversion on July 13, and also a disobedience by defendants of plaintiff's orders, and the action was maintainable for a conversion or a breach of duty; and that for such breach of duty an action *ex contractu* or *ex delicto*, could be maintained,—he laid down the rule that in an action for the conversion of property, the damages were the value of the article at the time and place of conversion, adding, according to modern authorities, the interest upon such value, from the time of conversion to the time of trial. He cited the following cases as adhering strictly to this rule: *Hallett v. Novion*, 14 *Johns.* 273; *Kennedy v. Strong*, *Id.* 128; *Dillenback v. Jerome*, 7 *Cow.* 294; *Baker v. Wheeler*, 8 *Wend.* 505; *Stevens v. Low*, 2 *Hill*, 132; and *Brizsee v. Maybee*, 21 *Wend.* 144.

He then traced the origin of the practice of allowing for increased value up to the time of trial, for chattels not having a fixed or determinate value, particularly in actions on promises payable in chattels, to the cases of *Clark v. Pinney*, 7 *Cow.* 681; *Cortelyou v. Lansing*, 2 *Cai. Ca.* 200; *West v. Wentworth*, 3 *Cow.* 82; *Commercial Bank of Buffalo v. Kortwright*, 22 *Wend.* 348; followed in *Nelson v. Mathews*, 24 *Barb.* 295. The authorities cited in those cases, and in *Suydam v. Jenkins*, 3 *Sandf.* 614, he reviewed, and pronounced the rule laid down in *West v. Wentworth*, and *Clark v. Pinney* unsound, and unsupported by the authorities. He then reviewed additional cases relied on for allowing, in trover, the highest price to the commencement of suit or the time of trial (including *Mercer v. Jones*, 3 *Campb.* 477; *Greening v. Wilkinson*, 1 *Carr. & P.* 635; *Baker v. Wheeler*, 8 *Wend.* 505; *Andrews v. Durant*, 18 *N. Y.* 496; *Dana v. Fiedler*, 12 *Id.* 40; *Whitten v. Fuller*, 2 *W. Blacks.* 903); and concluded that the fluctuating rule was unjust and dangerous, and,—though there was sometimes difficulty in ascertaining the time of conversion, and the plaintiff might often determine it by a demand,—yet when determined, the rule should be inflexible to estimate the damages as of that day. He was therefore of opinion that the true rule of damages was, the value of the wheat, at the time it would have arrived in New York, had it been shipped, less the amount plaintiff received; and that the judgment should be reversed.

BALCOM, J., delivered an opinion in which, after saying that the offer, in so far as it gave Noye the privilege of taking the wheat on July 13, was contrary to plaintiff's instructions, and defendants' sale on that day unauthorized and not binding on plaintiff, cited the following cases, beside others above mentioned; *Blot v. Boiceau*, 3 *N. Y.* 73; *Baldwin v.*

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This embraces essentially a cause of action in case and in trover, and entitles the plaintiff to the damages recoverable in those actions. I am not aware that, in the absence of fraud or misrepresentation, or willful misconduct, there is any difference in the rule of damages applicable to this case, whether the action be for a breach of contract or for a violation of duty; and I agree with one of the judges who delivered opinions on the former argument,* and with the superior court of New York, in *Suydam v. Jenkins*, 3 *Sandf.* 614, that there should be none. The question is one of complete indemnity to the party injured. It is not stated in terms, and perhaps not in effect, that the sale by the defendants was *fraudulent or in bad faith*; and, therefore, no damages, founded specially on that ground, ought to be recovered. But it is stated that the sale was without authority and in violation of instructions, and, therefore, every damage consequent upon such a sale should be allowed. It is not stated that the instructions to ship to

Harvey, *Anth.* 214; *King v. Leith*, 2 *T. R.* 141; *King v. Orser*, 4 *Duer*, 431; *Wilson v. Conine*, 2 *Johns.* 280; *Day v. Perkins*, 2 *Sandf. C.A.* 339; *Smith v. Griffith*, 3 *Hill*, 333; *Barrow v. Paxton*, 5 *Johns.* 258; *Martin v. Morgan*, 2 *Martin [La.]* 256; *Shepherd v. Johnson*, 2 *East*, 211; *Brown v. Sax*, 7 *Cow.* 95; *Babcock v. Gill*, 10 *Johns.* 287; *Betts v. Lee*, 5 *Id.* 348; *Curtis v. Groat*, 6 *Id.* 168; *Silsbury v. McCoon*, 4 *Den.* 832; *Rice v. Hollenbeck*, 19 *Barb.* 664; *Walther v. Wetmore*, 1 *E. D. Smith*, 7; *Wilson v. Little*, 1 *Sandf.* 351; *S. C.*, 2 *N. Y.* 443; *Arnold v. Suffolk Bank*, 27 *Barb.* 424; *Fisher v. Prince*, 3 *Burr.* 1863; *Clowes v. Hawley*, 12 *Johns.* 484; *Cunningham v. Bell*, 5 *Mas.* 161; *Frothingham v. Everton*, 12 *N. H.* 239; *Richmond v. Bronson*, 5 *Den.* 55; *Hargous v. Ablon*, 5 *Hill*, 472; *S. C.*, 8 *Den.* 406; *Shannon v. Comstock*, 21 *Wend.* 457; *Blanchard v. Ely*, *Id.* 342; *Pinney v. Gleason*, 5 *Id.* 398; *Rockwell v. Rockwell*, 4 *Hill*, 164; and concluded that to limit the damages to the value at the time of the conversion, would often give plaintiff less than the actual damages he had sustained, and on the other hand, defendants having acted in good faith, could not justly be held for the highest price reached in four months; and that the just rule was that the owner should never receive of the factor who has wrongfully sold, more than the direct and certain damages the owner sustained, except in the cause of fraud or bad faith. That it would not do to allow the highest price even within a reasonable time for a sale after arrival in New York, for this would introduce speculative damages. He likened the defendant's obligation to that of common carriers; and was therefore for reversal.

* Opinion of DENTON, Ch. J., p. 161, *above*.

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New York were with a view to the *immediate* sale of the wheat on its arrival at New York, and, therefore, the plaintiff should not be limited to the price of the wheat immediately after it would have arrived in New York, if forwarded according to the plaintiff's instructions. But it is stated, inferentially at least, that the order to ship to New York was with a view to an ultimate sale there, inasmuch as it is stated that, by the act of the defendants, the plaintiff lost large gains and profits in the *sale* of the wheat; and hence we may, perhaps, safely infer that the object of the plaintiff was eventually to make sale of the wheat. Perhaps, if this would involve a more restricted rule of damages than would otherwise obtain, the plaintiff is not limited to it, inasmuch as there is in the complaint substantially an allegation of an illegal conversion of the property by the defendants, entitling the plaintiff to such damages as belong to such a cause of action.

The causes of action in the complaint were sustained by the evidence. There was a plain violation of instructions by the defendants, though probably not in bad faith, and a sale by them at Buffalo or Tonawanda at a date when they were expressly ordered to ship to New York. This was a clear breach of duty, and, in effect, a conversion of the property; and the question returns, what damages was the plaintiff entitled to recover?

If the plaintiff's orders had been obeyed, he would have retained his property, and might, if he had so chosen, have kept the same up to the time of the trial, when a recovery for the value thereof would, in effect, and by operation of law, have transferred the title thereto to the defendants; or he might have elected his own time and place for the sale thereof. Of both of these rights he was deprived by the act of the defendants; and the defendants must make the plaintiff good. There is nothing in the case or in the evidence by which we can precisely ascertain what the plaintiff would have done with the property if he had retained it; and this presents one of the chief difficulties in ascertaining, in point of fact, the damages which the plaintiff has sustained. If he designed an immediate sale thereof, on its arrival in New York, the price at which he could have sold it at that time, as compared with the price

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which the defendants got for it, and which, from a stipulation in the case, we are authorized to infer, has been paid over to the plaintiff, would show the loss sustained by him. But, as before stated, neither the allegations in the complaint nor the evidence in the case disclose any clear proof of an intent to make an immediate sale; and I think, as well under well-settled rules of law as by the reason and spirit of the case, plaintiff ought not to be limited to such damages. He may be supposed to have been reasonably conversant with the market and with the prospects of a rise in price, and to have anticipated, to some extent, the results as to such rise, which subsequent events verified. What precisely he would have done is, as before stated, a question of difficult solution. If, at some subsequent time within a reasonable period after the conversion, he had notified the defendants of his election to adopt the price at that period, I think that would have fixed a reasonable and lawful standard for the estimate of damages. It would have been saying, in substance, I elect to consider the property as mine up to this period; I now elect to make sale of it, and I hold you responsible for the present value of the property. But no such course was taken. No notice was ever given, otherwise than such as is to be inferred from the commencement of the suit. No suit was commenced until years afterwards; and it is now claimed to be the legal rule that the aggrieved party may make price at any time after the conversion and before the trial of the cause, or, at least, that he may do so provided the suit is commenced within a reasonable time after the conversion. This was the rule adopted at the trial, with this qualification, that the price at the commencement of a suit, commenced within a reasonable time after the conversion, instead of the price at the time of the trial, furnished the criterion for estimating the damages.

In the absence of any definite means for ascertaining the period when the owner of the property would have disposed of it, we are necessarily more or less in the dark as to the amount of injury which he has sustained by the illegal act of the defendants, and are driven to resort more or less to conjecture, or to fix upon some arbitrary period for determining the price of the property. It is obviously a rule of doubtful justice to give

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to the plaintiff the whole period until the statute of limitations would attach for the commencement of his action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be, to allow the plaintiff some reasonable period within the statute of limitations for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of commencing the action, provided the action be commenced within a reasonable time after the conversion. This is an election to hold the defendant liable for the conversion, and in effect to treat the property as his. The time of the trial and verdict is, it is true, the time of the actual transfer of the property to the defendant by operation of law, or, rather, the payment or collection of the sum recovered completes and perfects the legal transfer to the defendant. But the commencement of the suit is the election to hold the defendant liable from and after that date, for the value of the property. Thus, as it appears to me, is justice done to both parties. The defendant, by converting the property, becomes liable for its value. If the plaintiff elects to take its value as of that date, the defendant has had the benefit of that precise sum. If the plaintiff at any time makes price, and notifies the defendant, whether it be by a specific notice before the commencement of the suit, or by the actual commencement of the action, the defendant can go into the market and sell the property of the plaintiff which he has theretofore converted to his use and realize its market value, or, if he has disposed of it, sell the property which, at the time of the illegal conversion, if he wishes to protect himself from loss, he is legally bound to provide himself with as a substitute for it, to meet the plaintiff's demands. Thus the defendant can substantially indemnify himself against loss; and if he fails to take measures to do it, is justly responsible in damages for his unwar-

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ranted aggression upon the rights of the plaintiff. This seems to me the just and equitable rule.

It is not, however, perhaps quite the rule which has obtained in the law for settling the question of damages in the case of an illegal conversion of property. I think that rule is too well settled now to be shaken, whatever we may think of its intrinsic justice and propriety; and there are strong reasons to be urged in its favor in these respects. The defendants' counsel wish to unsettle it; but it is better to abide by a rule of law that is firmly established in repeated adjudications of the courts, than to have a fluctuating rule which is constantly varying according to the caprice or the fallible judgment of judges or juries.

I think the rule of damages applicable to cases of this description is reasonably well settled to be as liberal as this in favor of the plaintiff, to wit: to allow to the plaintiff the highest price for the property prevailing between the time of conversion and a reasonable time afterwards for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; and as between these two periods—the time of commencing the suit, and that of trial—the rule is somewhat fluctuating. What this reasonable time shall be, has never been definitely settled, and may, perhaps, fluctuate to some extent according to the circumstances of the particular case. In the case at bar, it was held to be four months after the conversion, which terminated before the close of navigation in that year; which latter circumstance might perhaps be supposed to have some probable influence in raising the market price of the property in New York, and therefore as not unlikely to induce the plaintiff to retain the property until that time. I think the adjudications allow at least so much latitude in cases similarly circumstanced. For reasons before stated, the limit of time is necessarily to some extent arbitrary, for the want of available means to determine when the plaintiff would have sold his property, and, by consequence, the damages he has sustained. But it has been supposed, and I think reasonably, that a liberal allowance of time should be made in favor of the plaintiff and against the defendant, inasmuch as the latter is the defaulting party.

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It has been held in cases where damages are sought for the breach of a contract for the sale of personal property, wholly executory on both sides, that the true rule of damages is the difference between the purchase price named in the contract and the price of the property at the time fixed for performance; that, as nothing had been paid upon the property, if the plaintiff still wished to obtain the property, he could go into the market and procure it with the sum named in the contract, with the addition of its rise in value, or, if he chose simply to pocket the damages, he could do so by receiving a sum equal to the difference in value between the two periods, and thus obtain complete indemnity.

But that, where the executory contract had been performed on the part of the plaintiff by the payment of the price, and was broken by the defendant by the non-delivery of the property, the true rule of damages was to allow to the plaintiff the highest market price intervening between the time of conversion and the time of the commencement of the action, or of the trial when the action was commenced within a reasonable time after the conversion, upon the principle that it might be inconvenient or impossible and was unjust to require the plaintiff, in order to procure a similar article to that illegally converted, to pay the contract price a second time, with the added value prevailing at the period of performance; and that it was more equitable to hold the defendant responsible for the fluctuations of the market, so long as he continued to deprive the plaintiff of the article purchased, up to the period when, by operation of law and the effect of a verdict, the title was transferred from the plaintiff to the defendant.

It is further stated, in one of the opinions delivered in this case at a former term of this court,* that the present case is in principle analogous to that of an executory contract for the purchase of the property, where the purchase money is prepaid, inasmuch as the plaintiff, owning the property, has paid its price and acquired an absolute title to it, and cannot with justice be called upon to advance again the purchase money to buy a similar article. I concur in this reasoning, and think the same principle governs both cases. The plaintiff has, in

* Opinion of DENIO, Ch. J., p. 162, *note, above*.

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effect, advanced the price of the article; he has done more; he has become its absolute owner. He is not to be required to purchase similar property anew, for he may not be in a condition to do so, and he has lost his property, not by any fault of his own, but by an unjustifiable appropriation of it by another party. On the other hand, his adversary has, without legal right, possessed himself of another's property, and placed himself in a situation where he may possibly realize large gains from property thus arbitrarily acquired.

The difficulty lies in fixing the precise period when the value of the property should be estimated. I think it must, in all cases, be a *reasonable time* after the conversion. Even if the evidence is satisfactory that the plaintiff intended to retain the property, I do not think he should be permitted to roam through the entire period between the conversion and the time when the statute of limitations would attach, for the purpose of discovering the highest price at which the property sold in market. This gives to the transaction the color of a mere speculation, and not of a just ascertainment of damages actually sustained. The plaintiff might repossess himself of the article lost, if not restored to him by the act of the offending party within a reasonable time after he has been deprived of it, and this would make him good. The defendant, in default of a restoration of the property or an article of similar quality, should be held to answer for its value within a reasonable period. To compel him to respond for a succession of years for fluctuations in value, would seem unjust and oppressive.

Where the party, as in this case, holds the property for the purpose of traffic and sale, a reasonable period, according to the course of trade, should be allowed for the purpose of making such sale. If it be clear upon the evidence that an immediate or speedy sale were contemplated, I think such a fact would contract the limits of this reasonable period. If it were clear that months were expected to intervene before a sale should take place, I see no objection to extending this reasonable period to a similar length. If the evidence reflected no light on the subject, then a reasonable period would probably be a question of law, or, if some evidence were introduced, might be a mixed question of law and fact.

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I am unable to see that, on this question of reasonable time, the judge at the circuit committed any error which the facts in the case enable us to pronounce such, or of which the defendant is in a situation to avail himself. The judge charged—or held, for the trial was before the judge without a jury—that the measure of damages was the difference in price of the wheat at the time of the conversion and a reasonable time afterwards within which to commence the action; and in the light of what has been already said, I think the rule of law is therein well expressed. He further held that such reasonable period was four months after the time when the wheat, if duly forwarded, would have reached its destination in the city of New York. This is supposed to have been error. By what legal rule are we entitled to pronounce this to be error? What is there in the evidence to show that this was an unreasonable time? The party alleging error must show it—the presumption being in favor of the correctness of the ruling. Is it claimed that the reasonableness of the time depended on the circumstances of the case, and was a question of fact? Then the judge has found the fact against the defendants, and they are remediless. No request was made to find any specific time as the reasonable time, nor objection made to the decision of the question of reasonable time as a question of fact by the judge, so far as there was a question of fact involved in it. An exception was taken, it is true, to the determination of the judge, that November 29 was a proper date to make the valuation of the wheat; but there is no evidence to show that that time was unreasonable, and, therefore, the only question presented is one of law, whether the defendant was liable to have the damages estimated by the price of the wheat at a reasonable time after the conversion.

I have not thought it necessary, after the copious citations and searching analysis of adjudicated cases contained in the opinions delivered on the former argument of this cause, to refer to them again or discuss them in detail. I have referred to the principles which are involved in them, and also to those which pertain to an equitable view of the subject. The result of my reflections and examination of the cases is, that the rule

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laid down at the trial is sustained by the course of decision on this vexed question.

I am of opinion that the judgment of the court below should be affirmed.

DENIO, Ch. J., DAVIES, WRIGHT, H. R. SELDEN and INGRAHAM, JJ., concurred; MULLIN, J., dissented.

Judgment affirmed, with costs.

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December, 1867.

Upon an undertaking on an appeal taken by two appellants, that "if the said judgment appealed from, or any part thereof, be affirmed, the said appellants will pay the amount," the sureties are liable if the judgment is affirmed against *one* appellant, though *reversed* as to the other.

Franklin B. Seacord sued Caleb Morgan and John Warren on an undertaking which defendants gave, to effect an appeal in a previous action brought by plaintiff against Nicholas and Leonard P. Miller. The two Millers were sued as maker and indorser of a note, and after judgment against both, they appealed. To render the appeal effectual (under Code of Pro. § 335) the present defendants united in an undertaking binding themselves that "if the said judgment so appealed from, or any part thereof, be affirmed, the said appellants will pay the amount directed to be paid by said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellants on the said appeal."

Upon such appeal, this court affirmed the judgment against Nicholas Miller, the maker, and reversed it as against Leonard, the indorser, and judgment was rendered in his favor. *Seacord v. Miller*, 13 N. Y. 55.

The plaintiffs now sued on said undertaking, and averred that the judgment was affirmed as to Nicholas Miller, with costs, and reversed as to Leonard P.; that judgment had been perfected

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in the supreme court, upon the judgment of the court of appeals, and an execution had been issued against the property of Nicholas, and that the same had been duly demanded of said Nicholas, and that the defendants had notice thereof.

The referee gave judgment for plaintiff.

The supreme court, at general term, affirmed judgment for plaintiff,* and defendants appealed.

Wm. H. Taggard, for defendant, appellant;—Cited *Shearman v. N. Y. Central Mills*, 11 *How. Pr.* 271; *Moore v. Paine*, 12 *Wend.* 126; *Gates v. McKee*, 13 *N. Y. (3 Kern.)* 237; *Bigelow v. Benton*, 14 *Barb.* 123, 128; *Drummond v. Husson*, 14 *N. Y. (4 Kern.)* 60, 62; *Cheesborough v. Agate*, 7 *Abb. Pr.* 32; *S. C.*, 26 *Barb.* 603; *Barnard v. Viele*, 21 *Wend.* 88; *Poppenhusen v. Seeley*, 41 *Barb.* 452; *Sheldon v. Quinlen*, 5 *Hill*, 441; *Moulton v. Norton*, 5 *Barb.* 286; *Van Schoonhoven v. Comstock*, 1 *Den.* 655; *Cruikshank v. Gardner*, 2 *Hill*, 323, 334; *Farrell v. Calkins*, 10 *Barb.* 349; *Code* 1849, § 330; altering *Code* 1848, § 278; *Gardner v. Barney*, 24 *How. Pr.* 467; *Union Rubber Co. v. Babcock*, 1 *Abb. Pr.* 262; *S. C.*, 4 *Duer*, 620; *Chautauqua Bank v. White*, 23 *N. Y.* 350.

Samuel E. Lyon, for plaintiff, respondent;—Cited *Slack v. Heath*, 1 *Abb. Pr.* 339; *S. C.*, 4 *E. D. Smith*, 95; *Central Ins. Co. v. Moriarty*, 10 *How. Pr.* 344; 17 *Id.* 394.

BY THE COURT.—DAVIES, Ch. J. [After stating the facts.]—The only question of a serious nature urged upon us for a reversal of this judgment is, that, as it appears affirmatively that the judgment appealed from was against two defendants, and as it was affirmed only as to one defendant, and reversed as to the other, the event or contingency upon which these defendants agreed and undertook to pay the judgment appealed from has never happened. They undertook that, if the judgment so appealed from be affirmed, then the appellants would pay the amount directed to be paid by the said judgment, and all damages which might be awarded against the said appel-

* See 17 *How. Pr.* 394; 24 *Id.* 467.

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lants on the said appeal. The defendants contend that the judgment so appealed from has not been affirmed. There is some plausibility, it must be confessed, in this position, and it has been sustained by a very ingenious and able argument by the counsel for the appellants. And, were it an open question in this court, it would be proper to proceed with the discussion of the views suggested.

But, as we understand it, the precise question now presented was considered and passed upon by this court in the case of *Gardner v. Barney*, decided here in December, 1863, not reported. That was an action upon an undertaking given by the defendants on an appeal from a judgment of the special term to the general term of the supreme court, taken by the defendants Ogden and Smith. The judgment of the special term was against both defendants, and the appeal was from that judgment, by them, to the general term, and the undertaking similar in form to that given by these defendants. The general term of the third district reversed the judgment, and ordered a new trial. From this order the plaintiff, Gardner, appealed to this court, and this court reversed the order of the general term, granting a new trial, so far as it related to the defendant, Smith, and affirmed the judgment of the special term as to him, with costs. It also affirmed the order granting a new trial as to the defendant, Ogden, and gave judgment in his favor against the plaintiff, with costs. *Gardner v. Ogden*, 22 *N. Y.* 327.

The action in this court, above referred to, against Barney and Butler, was upon the undertaking given on the appeal taken by Ogden and Smith from the judgment against them at special term to the general term; and the question, as stated by DENIO, Ch. J., in the opinion of this court, was whether the affirmance of the judgment as to one of the defendants, who were together adjudged to pay a sum of money in the original action, rendered the defendants liable as sureties upon the undertaking.

That question is very carefully and fully discussed by the learned chief judge. And as his views upon this point have never been reported, and are so conclusive upon the point under discussion, and received on that occasion the approval of

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this court, it is not deemed inappropriate to quote them. Nothing further need be added upon the subject.

Judge DENIO said: "The expressions of the undertaking, which provide for the case of an affirmance only in part, appear to have reference primarily to the amount, and not to the number of persons charged. The language is, 'that the appellants, in the case of a partial affirmance, will pay the amount directed to be paid by the judgment, or the *part of such amount*, as to which it shall be affirmed, if it be affirmed only in part.' But independently of these words, I am still of opinion that this judgment has been affirmed according to the general sense of the instrument.

"The decision that the plaintiff is entitled to the amount of money adjudged to him by the special term, is sustained, and the position is upheld that he is entitled to recover it in the action. It was a case in which several damages might be given against one of the defendants, though the other should be acquitted. This is established by a judgment affirming the recovery as to Smith alone. The judgment of the special term has therefore been affirmed, with a variation, however, in this, that the recovery is to be satisfied by one and not by both of the defendants. It is not necessary to depart from the language of the instrument in order to charge the sureties. They are liable according to the terms of their undertaking. There has been an affirmance of the judgment appealed from. An equitable construction cannot be resorted to for the purpose of charging sureties. But if the case is within the letter of their contract, they are liable, unless there is something in the spirit and intention of the instrument, or of the law under which it is given, which exonerates them. The object of the undertaking is to procure an absolute stay of execution, and of all proceedings on the judgment, and such is its effect (§§ 335, 339.) The motive for requiring the undertaking, was to secure to the plaintiff the fruits of the recovery, in case it should be determined that the allegations of error were unfounded. As the plaintiff is, by the stay of execution, deprived of the immediate resort to the property of the judgment debtor, which the law would otherwise give him, and as his title to the amount adjudged in his favor is *prima facie* established, it was the pol-

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icy of the law that he should have security to indemnify him against the possible contingency of the delay. The law assumes the judgment to be such presumptive evidence of his right, that it will not subject him to the hazard arising from the delay of further litigation, without an indemnity against any loss which he might thereby incur. If it should be decided, that, in order to hold the sureties, the judgment should be affirmed in all its parts without variation or modification, the provisions for security would be illusory in a great variety of cases which may be supposed. Let us take the case of an equity suit against two defendants, and a judgment in a primary court against one, and an acquittal of the other, and cross appeals by the plaintiff as to the discharge of the one acquitted, and by the defendant who was held liable, and that the appellate court should hold that both were liable, and give judgment accordingly. It is plain that the sureties of the defendant, who was held liable by the first judgment, ought not to be discharged, for the complaint of that defendant against the judgment would be shown to be unfounded, and the plaintiff would have incurred the hazard against which the undertaking was intended to protect him; and yet, it could not be said that the identical judgment appealed from had been affirmed in every particular. The system of the provisions respecting security on appeals is explained by section 366 of the Code. A judgment directing the assignment or delivery of documents or personal property. The undertaking in that case was to the effect, that the appellant would obey the order of the appellate court on the appeal. This shows the general intention of the legislature, that the judgment of the primary court should not be delayed in its execution, unless the party charged should give security to abide the judgment of the superior court, if it should be adverse to him, without requiring that the same identical judgment should be sustained.

“The nature of the original action, and the liabilities upon which the recovery was had, are not stated in the present case. We may suppose them to have been what we know, by looking into the former case, they were, an alleged breach of duty on the part of the defendant Ogden, as a member of a firm who

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were the agents of the plaintiff for the sale of his land, in disposing of it in bad faith, and for a less price than it was worth, the defendant Smith being the buyer, under such circumstances as would estop from him of the defense of a *bona fide* purchaser. Both the defendants were held liable for the supposed value of the land, and although the judgment was joint in form, each was made liable on account of his supposed individual misconduct, and not on account of the delinquency of the other. It was more like a judgment against two tortfeasors, than one against joint debtors. In such cases the appeal is in effect several by each defendant, and it would have been perfectly correct for each defendant to have brought a separate appeal, and to have given a separate undertaking, though it was not irregular for them to join in the appeal and procure a single undertaking. But the proper construction of the instrument is, that the sureties undertake for each of the defendants. The defendant Smith was made liable for the value of the land, on account of having purchased it at a voidable sale, under circumstances which would not enable him to hold it against the plaintiff's equity; and Ogden was held liable in the same amount for having sold the land to Smith in violation of his duty; and the judgment contained a provision that Smith might satisfy the amount by reconveying such part of the land as he had not disposed of to others, and assigning and paying to the plaintiff the securities and money which he had received for the parts sold by him. Now it might very well be that the judgment could be sustained against one, while the other should be acquitted, and such was in fact the judgment of this court, which was in favor of Ogden, on the ground that he, being absent from the country, had no personal concern with the alleged illegal purchase from the plaintiff. The appeal taken under such circumstances was in effect several by each defendant, and the undertaking should be construed in connection with the judgment. Viewed in that light, the sureties must be considered as undertaking, in behalf of Smith, that if the judgment against him, from which he had appealed, was affirmed, he should pay the amount adjudged; and so of the defendant Ogden. If the sureties were bound separately for each defendant, in respect to the judgment

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against each, as I think they were, it is of no consequence that there was a reversal as to one of them. The terms of the contract adjust themselves to the case as it actually existed, and it is the same thing as though each had appeared separately, and the sureties had signed a separate undertaking upon each appeal. Though the nature of the action in the original suit, and the grounds of the judgment were not proved on that under review, neither was it shown that the judgment was one against joint debtors, and the condition annexed to it, allowing Smith to discharge it by a collateral act, shows that it was not an ordinary judgment against two persons jointly indebted. I am, therefore, of opinion, that the objection that the judgment has not been wholly affirmed, or affirmed as to both defendants, is not well taken."

These are the views of this court, so clearly expressed in a case so analogous to the present, that they must be regarded as controlling and not open to further discussion. It is impossible to point out any essential difference between the case under review and that in which the preceding opinion was rendered. If ever a case was *in quatuor pedibus* with another, this is with that. To the same effect is the case of *Potter v. Van Vranken*, 36 N. Y. 619.

In the record now before us it distinctly appears that the original judgment was not against the defendants therein as joint debtors, but a judgment against them upon the separate liability and contract of each. It was against Nicholas Miller, as maker of the promissory note in suit, and against Leonard P. Miller as the indorser thereof; and, as was observed in *Gardner v. Barney*, it might very well be that, under such circumstances, the judgment might well be sustained against one defendant, while the judgment against the other would not be allowed to stand.

Then the appeal, in effect, was in this case, as in that, a several appeal by each defendant; and we are to construe the undertaking to refer to the character of the judgment it was given to secure. In that light we must hold that the sureties are to be regarded as undertaking, on behalf of Nicholas Miller, that if the judgment against him, from which he had appealed, should be affirmed, he would pay the amount of the

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judgment; and the same as to the other defendant. Now, the judgment against the defendant Nicholas Miller was affirmed by this court, and upon such affirmance, the liability of his sureties to pay the judgment so affirmed became absolute. It was not impaired by the circumstance that this court reversed the judgment of the supreme court against the other defendant, Leonard P. Miller. It is not denied that if each defendant had taken a separate appeal to this court from the judgment against him, and an undertaking had been executed upon each appeal, that in case of the affirmance of the judgment upon either appeal, the sureties in respect thereto would have been fixed, although the judgment on the other appeal had been reversed. We held in *Gardner v. Barney*, that in a case like the present, it is the same thing as though each defendant had appealed separately, and the sureties had signed a separate undertaking upon each appeal. That is decisive of the case at bar.

The finding of the referee, that the *remittitur* from this court, containing the affirmance of the judgment, was filed in the supreme court by its order, is conclusive of the facts, and of the regularity of the plaintiff's proceedings. We have no doubt of the power of the supreme court to direct the order to be entered, making the judgment of that court, *nunc pro tunc*. *Chautauqua County Bank v. White*, 23 N. Y. 347.

The judgment should be affirmed, with costs

A majority of the judges concurred.

Judgment affirmed, with costs.

SEARS v. CONOVER.

December, 1866.

Affirming 34 Barb. 330.

A contract to plant a certain area of land, and sell all the crop raised, is assignable by the buyer, without assent of the seller.

If the seller in such a contract, sells the crop to a third person, and avows to the other party having done so, and refuses to perform, before the time fixed for performance, this is a breach without further demand.*

* Compare *Rouse v. Lewis*, p. 121 of this vol.

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On a motion for a new trial on the ground of excessive damages, the court may refuse to set aside the verdict, if plaintiff will consent to deduct the amount deemed excessive.

John R. Sears sued Joseph Conover in the supreme court for breach of an executory contract made with Stephen B. Conover, and by him assigned to plaintiff.

In March, 1857, the defendant and Stephen B. Conover entered into mutual written contracts, whereby the defendant agreed to sell and deliver to S. B. Conover, all the peach-blow potatoes that he, the defendant, should raise the coming season, in good merchantable order, delivered on the boat at twelve shillings per barrel, and he agreed to plant ten acres or more. In consideration thereof, Conover agreed to take such crops.

It appeared that, in the latter part of September of that year, S. B. Conover called on the defendant to see about the potatoes, when the defendant said he had sold the potatoes for more money than he (S. B. Conover) had agreed to give, and he (S. B. Conover) could not have them. S. B. Conover then assigned the contract to the plaintiff, and delivered the same to him. This was about October 1, 1857. On October 5, S. B. Conover prepared a notice to the defendant, setting forth that he had assigned the contract with the defendant to the plaintiff, and requested the defendant to deliver the crop to the plaintiff, agreeably to the terms of the contract. The plaintiff, underneath such notice and copy of said contract, under the same date, also gave notice to the defendant that he had purchased the said contract from Stephen B. Conover, and requesting a delivery of the potatoes on the boat according to the terms of the contract, and informing the defendant that the money for the potatoes would be ready for him, upon delivery, at the price named in the contract. When these notices were shown to the defendant and read to him by Stephen B. Conover, he said, "I told you, when you were here before, that you could not have the potatoes, that I had sold them, and I tell you so again; I do not know John R. Sears, and have made no contract with him."

The defendant moved for a nonsuit, or dismissal of complaint, because: 1. No valid assignment to the plaintiff of the

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contract named in the complaint had been proved. 2. Plaintiff had not proved any right of action. 3. He had not performed the conditions precedent as the purchaser of the potatoes or assignee of the contract. 4. There had been no assignment since the alleged breach, and until a breach of the contract there could be no transfer of the right of action.

The court refused to dismiss the complaint; and rebutting testimony was then offered on the part of defendant; after which the judge charged the jury, that plaintiff had proved that he was the assignee of the contract, and that it was a valid contract of bargain and sale. The jury returned a verdict for plaintiff for five hundred dollars.

The supreme court, at general term, on appeal affirmed the judgment, on condition that the plaintiff deduct two hundred dollars from the amount of the verdict, because it appeared that defendant's crop was only one hundred and fifty bushels. This he did, and judgment was entered accordingly. The grounds of the affirmance were substantially the same as those assigned in this court.

G. Dean, for defendant, appellant,—Insisted that a refusal to perform before harvest was nugatory. That the contract was one in which the parties relied on the responsibility of each other, and therefore was not assignable; and that as the recovery was not for a claim of items, but a gross sum, the court could not reduce the verdict. *Code*, § 330; *Chouteau v. Suydam*, 21 *N. Y.* 185; *Boyd v. Foot*, 5 *Bosw.* 111.

T. D. Pellon, for plaintiff, respondent;—Cited 2 *Pars. Contr.* 188, note; *McNish v. Coon*, 13 *Wend.* 26; *Coonley v. Anderson*, 1 *Hill*, 524; *Chitty on Contr.* 732, 96; 2 *Greenl. Ev.* § 238; *Mott v. Mott*, 11 *Barb.* 127; 2 *Story Eq. Jur.*, § 1040, b; *Demarest v. Willard*, 8 *Cow.* 206; *Ferris v. Easterman*, 3 *Metc.* 121; *Franchot v. Leach*, 5 *Cow.* 506.

BY THE COURT.—DAVIES, Ch. J. [After stating the facts.]
—The motion to dismiss the complaint was properly denied.

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The contract was assignable, and was duly assigned. On the assumption that there had been a breach of the contract, before the assignment, Stephen B. Conover had a right of action for the damages which he had sustained, and undeniably that right of action was assignable.

The defendant was guilty of a breach of his contract when he sold the potatoes called for by the contract, and his avowal that he did not intend to deliver the potatoes under it, was the best evidence of a breach of it. This evidence was uncontradicted at the time this motion was made, and must be assumed to be true.

The avowal of the defendant that he could not, and would not, fulfill the contract on his part, rendered wholly useless any demand on the part of the plaintiff, or offer on his part to fulfill the contract. But such demand and offer were made in the paper shown and read to the defendant, under date of October 5. Upon the proof, this plaintiff was clearly entitled to recover the damages sustained for a breach of this contract.

The jury fixed the amount of the damages at five hundred dollars, and it was competent for the general term of the supreme court, if, in its judgment, such damages were excessive, to order a new trial, or, in its discretion, to affirm, in case the plaintiff should remit the amount adjudged excessive. The Code confers powers, upon an appeal from a judgment or order, on the appellate court, to reverse, affirm or modify the judgment or order appealed from. § 330. It has long been the settled practice of the court, on a motion for a new trial, to refuse to set aside the verdict, if the parties would consent to deduct any amount deemed excessive. 3 *Grah. & Wat. on New Trials*, 1162, and cases there cited.

Such a proceeding was recognized and approved by this court in *Chouteau v. Suydam*, 21 *N. Y.* 179. In that case, the general term affirmed a judgment in favor of the plaintiffs, conditionally, upon their consenting to certain modifications, reducing the amount of the judgment, which they did, and one of the defendants then appealed to this court. This court affirmed the judgment, with costs, of the appeal to this court.

No good reason is suggested why we should disturb the

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judgment in this action; and the judgment appealed from should, therefore, be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages, penalty.

SECOND MANHATTAN BUILDING ASSOCIATION v.
HAYES.

December, 1865.

Under the building association act (*L.* 1851, p. 234. c. 122, § 3), it is not necessary that the copy of the articles to be filed should be signed by the trustees, for they are not *officers*, within the meaning of the statute.

The plaintiffs brought this action against Dennis Hayes and wife, to foreclose a mortgage executed by Patrick J. O'Brien and his wife, to the plaintiffs, by their alleged corporate name; and the defendants were the grantees of the mortgaged premises.

The plaintiffs claimed to have been incorporated pursuant to *L.* 1851, c. 122, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations." By that act any number of persons, not less than nine, may associate and form a company for the purposes mentioned. § 1. These persons must subscribe articles of association, which are to set forth a great number of particulars, including the corporate name, and "what *officers, trustees* and attorney there shall be." § 2. And a true copy of such articles, signed by *the officers* of the association, together with a statement showing when the association was organized, and the place of the transaction of its business, and the names of the *officers and trustees* at the time of making such statement, which is to be verified by oath or affirmation, must be filed with the clerk of the proper court, and thereupon the association is to become a body corporate, &c. § 3.

The plaintiffs produced from the county clerk's office, papers purporting to be a copy of the articles of association, and a

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statement setting forth the several matters referred to in section 3, and verified by the oath of J. N. Genin, the president. The copy of articles purported to be signed by several individuals, embracing the names of all the persons named in the statement as officers and trustees, except the name of Andrew B. Beers, one of the trustees, and no question as to the genuineness of the signatures was made. In the statement given in evidence, the time when the association was organized was said to be September ———, A. D. 1851, a blank for the day being left apparently by mistake.

The referee, on the ground of the omission of the name of Mr. Beers, among the signatures to the copy of articles, gave judgment for defendants.

The supreme court, at general term, on appeal, reversed the judgment, holding that the trustees, although styled officers in the articles of association, were by the provisions of the act of 1851, treated as distinct from the officers; and that the defendant's objections were not competent in this action, because it was conceded that the plaintiffs, since the filing of the statement, had acted as a corporation, and in the course of their business took the mortgage, and it also appeared by the mortgage itself that the corporate existence of the plaintiffs was expressly recognized, and the mortgagor therein declared himself to be a corporator, and that he had signed the articles of incorporation. That the deed also under which the defendants claimed conveyed the premises subject to the mortgage, which was declared to be a part of the consideration money mentioned in the deed. That these acts were sufficient to constitute the plaintiffs a corporation *de facto*, since all that was required for that purpose was a special act of incorporation, or a general law, authorizing the incorporation of the plaintiffs with the power exercised by them, and a user of the rights conferred by law. *United States Bank v. Stearns*, 15 *Wend.* 314.

The defendants appealed.

D. T. Walden, for defendants, appellants.

G. T. Jenks, for plaintiff, respondent.

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DENIO, Ch. J. [After stating facts.]—If the copy of articles were required to be signed by the trustees; in other words, if the trustees are embraced within the term “officers,” as used in section 3, the omission of one of them to sign would be a defect which might defeat the title of the association to be regarded as a corporation. It is no doubt true that to create a corporate body under these general laws, the formal requirements of the statute must be substantially followed. But it seems very clear to me that the trustees were not required to sign. When we speak of the officers of a corporation, the term is understood to define those who are intrusted with the executive powers of the corporate body; and if it is intended to embrace the board of directors, trustees or managers, they are expressly named. By officers we mean the president, vice-president, cashier or secretary, and any others who are intrusted with a part of the executive authority. The trustees are no doubt in one sense officers, and when that term is used in some connections, it would embrace all who participate in the exercise of the corporate functions, including the legislative board. The members of the legislature of the State are in that general sense officers of the State though they clearly do not come within the designation of State officers. The language of the act we are construing, recognizes in a very pointed manner the distinction I am endeavoring to point out. The articles are, by section 2, to state what officers, trustees and attorney there shall be; and section 3 discriminates still more distinctly. The copy articles are to be signed by *the officers* of the association, and the sworn statement is to set forth the names of the officers *and trustees*, thus showing very plainly that the latter class of corporate authorities were not understood by the legislature to be embraced in the term officers. I conclude therefore that there was no defect in these proceedings of the kind suggested, and that the referee fell into an error in that respect.

We have not thought it necessary to inquire into the effect of the recognition of the corporation, by the mortgagees, by executing the bond and mortgage to the association in its corporate name, or by the defendant taking a convey-

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ance of the mortgaged premises, subject in terms to this mortgage.

The question as to the effect of leaving a blank in the statement of the day on which the corporation was organized is not before us, as the statement is not set forth in the referee's conclusions of fact, nor is there any reference to it. The paper merely states that Mr. Beers, a trustee, did not sign the articles, and upon that single circumstance he founds the legal conclusion that no corporation was created. As that was an erroneous determination, the judgment was rightly reversed by the general term. If there was to be a new trial it would be material to pass upon the other alleged defect; but by the stipulation there is to be judgment absolute for the plaintiff if the order is, as it must be, affirmed.

CAMPBELL, J. [After stating facts and reciting the statute.]—In this case the copy of articles filed was signed by the president, vice-president, secretary, surveyor and attorney, and counselor, and also by all the trustees except one. The statement verified by the oath of the president set forth the names of the president, vice-president, secretary, surveyor and attorney and counsellor, and also the names of all the trustees, including the name of the trustee who had not signed the copy of the articles filed. Does the law require that the copy of the articles filed shall be signed by the trustees of the association? I think clearly not. The word officers, when used in connection with corporations, has a well known and defined meaning. It includes presidents and secretaries, and in some cases perhaps actuaries and surveyors; such persons as have the immediate and direct care and management of the property and business of the corporation. Directors and trustees may be said to hold office in the corporation in a general sense, and may control and direct presidents and secretaries in the management of the business of the corporation. But in the transaction of such business with the public, the corporation generally speaks through its president and secretary. They are emphatically its officers.

It is very clear that this general building act contemplated such distinction. The very section which declares that the copy

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of articles to be filed must be signed by the officers, also declares that the statement which must accompany such articles, and must also be verified, must contain, in addition to the names of the officers, the names of the trustees of the association. But the law requires that the statement thus verified shall show when the association was organized. This statement shows that the association was organized in the month of September, 1851, but does not mention the day of the month, but as it was sworn to on September 20, the organization must have been made on that day, or on some day prior in that month. No question between the parties arises as to the date, as the mortgage in suit was not given until the following year. The only question is, whether the statement is in compliance with the statute, which requires the time when organized to be shown. In this case the time "when" is shown to have been in the month of September, 1851. There is nothing in the statute, and nothing in the general policy of provisions of the law, which would in any way seem to indicate that more precision was required. In this case it is very evident the day of the month was inadvertently omitted, as there is a blank in the statement for the filling in of the day. But it seems to me this omission is of no moment, and that the time when the organization was made is shown with sufficient precision.

The defendants took a conveyance of the property covered by this mortgage, expressly subject thereto, and which conveyance declared that the amount due on such mortgage formed a part of the consideration or purchase price of the property. There are no merits in the defense.

The order of the supreme court should be affirmed.

All the judges concurred.

Order affirmed with costs, and judgment absolute for plaintiffs; judgment for foreclosure and sale, to be entered below.

SECOR v. LAW.

September, 1867.

* Affirming 9 *Boro.* 163.

One of several associates, having employed plaintiffs to do work for the benefit of all, and having accounted with his associates on the basis of assuming and being credited with payment of what is due to the plaintiffs, is liable to plaintiffs therefor, without his associates being joined in the action.*

In an action on the contract, an amendment of the complaint necessary to make this ground of liability appear, may be allowed by the referee at the trial.

Theodosius F. Secor and Charles Morgan sued George Law in the New York superior court, for work, labor and materials, done under a special contract, and extra thereto.

The defendant and others who were associated in building steamships to fulfill a government mail contract, made an agreement with each other, whereby the defendant and Messrs. Roberts, Crosswell and Wetmore agreed to build the vessels, conformable to the government contract, and under defendant's direction; the vessels when built to be held by the defendant, and Roberts and McIlvaine as trustees for the associates. The hulls of the vessels having been thus built, defendant made a contract with the plaintiffs, employing them to furnish the engines. This contract, which was in form tripartite, purported to be made by plaintiffs with the defendant and Roberts, and Crosswell and Wetmore, but was signed only by defendant, and by the members of plaintiffs' firm.

The complaint, as the pleadings stood at the commencement of the trial before a referee, was for the value of work under the contract; and of extra work; and for a sum found due on an accounting for work, &c., on the same vessels.

On the trial before a referee, the plaintiffs were allowed to amend the complaint, by adding another cause of action claiming on an accounting, in respect of the same sums claimed

* See *Coster v. Mayor, &c. of Albany*, 43 *N. Y.* 399.

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for work, &c., and for wharfage, and a cross claim for delay.—and a promise by defendant to pay the balance.

The referee found that the defendant made the agreement with plaintiffs in consideration of their giving him a receipt for one tenth of the nominal sum to be paid them, and accepting a conveyance of land in payment of about $\frac{2}{3}$ more; and that he rendered his account to his associates, charging this as cash paid; and that in the settlement with his associates he agreed to pay to plaintiffs the residue due them.

The superior court held that the facts authorized the referee to infer that exclusive credit was given to defendant; also that as he had been allowed by his associates the sum he assumed to pay plaintiffs, he was liable therefore alone. Reported in 9 *Bosw.* 163.

H. W. Robinson, Waldo Hutchins, W. F. Allen, for defendant, appellant;—Cited *Broome on Parties*, (Law Library Ed.) *Waugb v. Crane*, 1 *H. Bl.* 235; *Brofield v. Smith*, 12 *M. & W.* 405; *King v. Lowry*, 20 *Barb.* 532; 3 *Kent Com.* 155, 156 and cases cited note (a) 41–44; *Muldon v. Whitlock*, 1 *Cow.* 290; *Pearce v. Wilkins*, 2 *N. Y.* (2 *Comst.*) 469; 1 *Pars. on Cont.* 162; *Story on Agency*, §§ 37, 124, *Smith's Mer. Law*, 93; *Willet v. Chambers*, *Cowper*, 814; *Alexander v. Barker*, 2 *Crompt. & Jer.* 139; *Cro. Car.* 550; *Ch. on Cont.* 71, 227; *Clason v. Bailey*, 14 *Johns.* 484; *Schermerhorn v. Loines*, 7 *Id.* 311; *Higgins v. Packard*, 2 *Hall*, 547; 1 *Ch. Pl.* 47, 42; *David v. Ellice*, 5 *B. & C.* 196; 3 *Id.* 611; *Dezell v. Odell*, 3 *Hill*, 215; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 *N. Y.* 392; *Reynolds v. Lounsbury*, 6 *Hill*, 534; *Lawrence v. Brown*, 5 *N. Y.* (1 *Seld.*) 394; *Lansing v. Montgomery*, 2 *Johns.* 282; *Welland Canal Co. v. Hathaway*, 8 *W. R.* 480; *Street v. Tuttle*, 14 *N. Y.* (4 *Kern.*) 465; *Wooster v. Chamberlin*, 28 *Barb.* 602; *Code*, §§ 122, 173, 170; *Relyea v. Drew*, 1 *Den.* 563; *Query v. Bordlinger*, *Litt. Sel. Cas.* 87; *Kelsey v. Western*, 2 *N. Y.* (2 *Comst.*) 506; *Catlin v. Gunter*, 11 *N. Y.* (1 *Kern.*) 369; *Codd v. Rathbone*, 19 *N. Y.* 37; *Brazill v. Isham*, 1 *E. D. Smith*, 437, affirmed in 12 *N. Y.* (2 *Kern.*) 9; 2 *Pars. on Cont.* 27, 28; 4 *Rep.* 80; 4 *Taunt.* 329; *Cook v. Jennings*, 7 *T. R.*

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381; *Selway v. Fogg*, 5 *M. & W.* 83; *Smith v. Smith*, 1 *Sandf.* 206; *Ladue v. Seymour*, 24 *Wend.* 60; *Ferris v. Paris*, 10 *Johns.* 284; *Taylor v. Bates*, 5 *Cow.* 376; *Walrath v. Thompson*, 6 *Hill*, 540; *Sears v. Patrick*, 23 *Wend.* 527; *Cooley v. Betts*, 24 *Id.* 203; *Savage v. Putnam*, 32 *N. Y.* 506; *Colvin v. Holbrook*, 2 *N. Y.* (2 *Comst.*) 126; *Costigan v. Newland*, 12 *Barb.* 456; *Cobb v. Beck*, C. 6 *Q. B.* 930; *Barlow v. Burrow*, 16 *M. & W.* 126; *Malcolm v. Scott*, 5 *Exch.* 601; *Williams v. Everitt*, 14 *East.* 582; *Nedlake v. Hurley*, 1 *Cromp. & Jer.* 83; *Bigelow v. Davis*, 16 *Barb.* 561; *Mech. & Farm. Bank v. Whinfield*, 24 *Wend.* 426; *Clark v. Vorce*, 19 *Id.* 232; *Myers v. Malcolm*, 6 *Hill*, 296; *Dresser v. Ainsworth*, 9 *Barb.* 619; *Boyle v. Colman*, 13 *Id.* 44, and cases cited; *Worrell v. Parmelee*, 1 *N. Y.* (1 *Comst.*) 519; *Platt v. Halen*, 23 *Wend.* 456; *Saltus v. Genin*, 3 *Bosw.* 250; *Union Bank v. Mott*, 10 *Abb. Pr.* 372; *Ed. on Relief*, 33.

John H. Reynolds, for plaintiffs, respondents;—Cited *Colvin v. Holbrook*, 2 *N. Y.* (2 *Comst.*) 126; *Rathbon v. Budlong*, 15 *Johns.* 1; *McComb v. Wright*, 4 *Johns. Ch.* 659; *Mills v. Hunt*, 20 *Wend.* 431; 2 *Kent Com.* 630; *Dunlap's Paley on Agency*, 371, 372; *Weston v. Baker*, 12 *Johns.* 276; *Buel v. Boughton*, 2 *Den.* 91; *Lawrence v. Fox*, 20 *N. Y.* 268; *Code*, §§ 272, 172; 3 *Abb. Pr.* 431; 11 *N. Y.* (1 *Kern.*) 237.

BY THE COURT.—GROVER, J.—[Remarks on an immaterial exception and an unavailable objection, are omitted.]

As to the first question, the referee found that, before the commencement of the action, the associates of defendant paid him their respective shares of the demand in suit, and that he agreed with them to pay and satisfy the plaintiffs therefor. This rendered him individually liable to the plaintiffs upon such demand, irrespective of the question whether he was so liable upon the contract. *Lawrence v. Fox*, 20 *N. Y.* 268. In that case, it was decided by this court that an action could be maintained upon a promise made by the defendant upon a valid consideration to a third person for the benefit of the plaintiff, although the latter was not privy to the considera-

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tion. It was further held, in the same case, that a creditor could maintain an action against a person who had borrowed money of his debtor upon a promise to pay the amount to the creditor. The present case falls directly within the principle of this case. Here, from the facts found by the referee, the defendant was allowed this demand by his associates upon a settlement between them, and paid by them their respective shares, and in consideration thereof, promised to assume and settle the demand with the plaintiffs. The defendant was individually liable to the plaintiffs upon this contract.

The referee had the same power to allow an amendment as the court has upon a trial. *Code of Pro.* § 272. The court (§ 173) has power, upon trial, to amend by inserting additional allegations, and to conform the pleadings to the proof. These sections authorize the amendment allowed by the referee.

All the judges concurred.

Judgment affirmed, with costs.

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December, 1867.

A competent testator, free from undue influence, may make whatever will he choose, though unjust and unreasonable.

Undue influence, to avoid a will, must be an influence exercised by coercion, imposition or fraud; not merely such as arises from the influence of gratitude, affection or esteem. It must be the ascendancy of another will over that of the testator. And it must be proved; it will not be inferred from opportunity and interest.*

James S. Seguine died at his residence, at Deep Creek, in the State of Virginia, January 11, 1860, aged about fifty-five. He was born in the county of Richmond (Staten Island), his family being an ancient one in the county, but, from early life,

* But it may be proved by circumstantial evidence. *Marvin v. Marvin*, vol. 3 of this series, p. 192, and see *Nexsen v. Nexsen*, *Id.* 360.

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resided and was engaged in business till his death, in Virginia. His business was mainly lumbering on the Dismal and other southern swamps, but in connection therewith he built and owned shares in several vessels employed in the transportation of his lumber and other freight. He left an only son, the appellant, who was a few months old at the death of his mother, in 1838. His other near relations were a sister, the widow of a Mr. Guyon, and a brother, Henry S. Seguine. The brother and sister always resided on Staten Island, as did the son, who was reared in the family of the sister; the decedent, after the death of his wife, never marrying again, or keeping a domestic establishment. He had lodgings in Virginia, where he spent most of his time, visiting the north in the summer season; and, on such occasions, and when north on business, made his brother's house on the island his home. He accumulated an estate worth over one hundred thousand dollars. Except of a farm on the island, formerly belonging to his father, purchased by him in 1858, and fitted up and improved at a cost of some fifteen thousand dollars, as a home for his son, his property was principally personal, invested in Virginia and at the north. By his will, executed in May, 1859, some seven months prior to his death, and on his last visit to the north, after giving specific legacies to the amount of two thousand dollars, he gave to his sister, Mrs. Guyon, an annuity of five hundred dollars; to his son, James Henry Seguine, an annuity of seven hundred dollars, and also an estate for life in the homestead farm, purchased for him in 1858; remainder to the son's children, if no children to his grandchildren, him surviving, with a direction to the executors to expend the further sum of four thousand dollars in improving the farm for the son's use; and to the brother, Henry S. Seguine, the residue of the estate.

When the executor propounded the will for probate, before the surrogate of Richmond county, it was opposed by the testator's son, on the ground of a want of testamentary capacity in the deceased, and of undue influence. The questions were whether, through intemperance and disease, the decedent was incompetent to make a will, or if not legally incompetent, was *imbecile*; and whether in that condition he was unduly influenced. The details appear in the opinion.

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The supreme court affirmed the decree of the surrogate admitting the will to probate.

A. W. Bradford, for appellants;—Cited *Ahren Droit Natu-rel*, 389 (1848); *Digest*, lib. II. tit. 18, *De Inofficiosa Testamento*; *Id.* lib. V. tit. 2; *Marcianus*, lib. IV; *Dig.* lib. IV. tit. 2, *De Inofficiosa Testamento*, § 3; citing *Marcellus*, lib. III; *Gaius*; *Id.* § 4; *Dirksen Manual*, 226, 482; *Novercalis*, 633; *Marcel-lus Dig.*, *ibid.*, § 5; *Cicero v. Verres*, 1, 42, 107; *Copeland Medical Dict.* art. Gout, vol. III. 44; *Wharton*, 136; note to 136; 147; 148-165; 166, 168, 169; 97, 98; 10; 13; 11; 6, 8, 9; 15; 17, 19; 91; *Fowlis v. Davidson*, 6 *Notes of Cases*, 473; *Waring v. Waring*, 6 *Notes of Cases*, 389; 2 *Hellfeld*, l. 5, § 2; *Johnston v. Johnston*, 1 *Phill.* 447; *Waddilove Dig.* tit. Will—Capacity, ed. 1840, 314-321; *Parish Will Case*.

Samuel Hand, for respondents;—Cited *Gardiner v. Gardiner*, 34 *N. Y.* 157, 162; *Clapp v. Fullerton*, *Id.* 190, 199; *Gamble v. Gamble*, 39 *Barb.* 373; *Grindall v. Grindall*, 4 *Hagg. Eccl.* 1; *Wench v. Murray*, 3 *Curt. Eccl.* 623; *Butler v. Barry*, 1 *Curt.* 614; *Earl of Sefton v. Hapwood*, 1 *Fost. & F.* 578; *Arbery v. Ashe*, 1 *Hogg*, 214; 2 *Justinian Inst.* 79, n, Dr. Harris' ed; 2 *Black. Com.* 502; *Peck v. Cary*, 27 *N. Y.* 18; 1 *Redf. on Wills*, 52; *Ross v. Christman*, 1 *Ired. L.* 209; *Temple v. Temple*, 1 *Hon. & Mun.* 496; *Handley v. Lacy*, 1 *Fost. & F.* 574; *Mc-Masters v. Briar*, 29 *Penn.* 298; *Taylor v. Kelly*, 31 *Ala.* 59; *Dean v. Negley*, 41 *Penn.* 312; *Eckert v. Fleary*, 43 *Id.* 46; *Small v. Small*, 4 *Green*, 220; *Trumbull v. Gibbons*, 2 *Zab.* 117; *Carroll v. Norton*, 3 *Bradf.* 320; *Dean v. Negley*, 41 *Penn.* 312; 33 *N. Y.* 624; *Taylor Med. Jur.* 626, 6 ed; *Leaycraft v. Sim-mons*, 3 *Bradf.* 35; *Weston v. Gillespie*, 11 *Ves.* 638; *Paine v. Hall*, 18 *Id.* 475; *Williams v. Fitch*, 18 *N. Y.* 546; *Home v. Home*, 9 *Iredell (N. C.)* 99; *Harrell v. Harrell*, 1 *Duval (Ky.)* 203; *Austin v. Graham*, 29 *Eng. L. & Eq.* 38.

A. C. Bradley, for respondents;—Cited *Jackson v. Van Du-sen*, 5 *Johns.* 144, 158; *Jackson v. King*, 4 *Cow.* 207, 216; *Delafeld v. Parish*, 25 *N. Y.* 9, 97; *Ayrey v. Hill*, 2 *Add.* 206; *Shelford on Lunacy*, 304; *Cartwright v. Cartwright*, 1 *Phill.* 14.

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90; *Brogden v. Brown*, 2 *Add.* 441; *Peck v. Cary*, 27 *N. Y.* 9, 17; *Stanton v. Wetherwax*, 16 *Barb.* 259; *Dew v. Clark*, 3 *Add.* 79, 279; *Wheeler v. Anderson*, 9 *Hagg.* 574; 3 *Id.*; *Morrison v. Smith*, 3 *Br.* 209; 1 *Jarm. on Wills*, 56-65; 37, and authorities; 39, and authorities; *Frere v. Peacocke*, 1 *Rob. Ec.* 442; *Felleck v. Allenson*, 3 *Hagg.* 527; *Thompson v. Quimby*, 2 *Bradf.* 449, affirmed in 21 *Barb.* 107; *Harrison's Case*, 1 *Bradf.* 378; *Wheeler v. Alderson*, 3 *Hagg.* 574; *Gardner v. Gardner*, 22 *Wend.* 538-40; *Hoby v. Hoby*, 1 *Hagg.* 146; *Bird v. Bird*, 2 *Id.* 142; *Robson v. Rorke*, 1 *Add.* 53; *Blanchard v. Nestle*, 3 *Den.* 37, 43; *Newhouse v. Godwin*, 17 *Barb.* 236; *Stultz v. Schaffie*, 18 *Eng. L. & F.* 576; *Sefton v. Hopwood*, 1 *Fost. & F.* 578; *Mackenzie v. —*, 2 *Hagg.* 111.

BY THE COURT.—WRIGHT, J. [After stating the facts above.]—The bulk of the property, it is true, is given to the testator's brother, and it may be conceded, that the will is a will inofficious, so far as regards his son. But if the son had been wholly disinherited (which he is not, but a moderate competency given to him), not in favor of the brother, but of parties, strangers in blood to the deceased, it would be no ground, of itself, for avoiding the instrument. The doctrine of inofficious testaments, invoked from the civilians, has no place in our law. A man has a right to make whatever disposition of his property he chooses, however absurd or unjust. If capacity, formal execution and volition appear, his will must stand. A "disposing mind," said CRESWELL, J., in *Earl of Sefton v. Hopwood*, 1 *Fost. & F.* 578, "does not mean that he should make what other people think a reasonable will or a kind will, because, by the law of this country, he has absolute dominion over his own property, and if he, being in possession of his faculties, thinks fit to make a capricious, harsh or cruel will, you have no right to interfere; that would be to make his will for him, and not to allow him to make it." "The right of a testator to dispose of his estate," said PORTER, J., in delivering the opinion of this court in *Clapp v. Fullerton*, 34 *N. Y.* 190, 196, "depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capa-

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city, and no undue influence or fraud, the law gives effect to his will, though the provisions are unreasonable or unjust." *Grendall v. Grendall*, 4 *Hagg. Ec.* 1; *Wench v. Murray*, 3 *Curt.* 623; *Butler v. Barry*, 1 *Id.* 614; *Peck v. Cary*, 27 *N. Y.* 9, 18; If the deceased, then, possessed the requisite testable capacity, and the instrument was the free emanation of his will, it is valid, and is entitled to probate; and it is incumbent on us so to adjudge, much as in another forum we might be induced to regard the narrow provision for the son, in view of the decedent's wealth, as unjust and undutiful. There are, therefore, but the two questions, was there capacity? and freedom from restraint?

1. As to capacity. The evidence as to the general capacity of the deceased is but one way. The case is not a balanced one, or one where the evidence greatly preponderates on that subject. The deceased, as has been stated, had been actually engaged in lumbering in Virginia for over thirty years, and, according to all the the testimony, was an unusually shrewd and energetic business man. His mind was clear, vigorous, and strong. He was also a firm man, decided, self-reliant. A witness characterizes him (and this was the tenor of all the proof) as a man of "great capacity for business, remarkable for his firmness, self-reliance, and tenacity of purpose." That clearness, solidity and strength, were the general mental characteristics evinced by him throughout most of his life, is not questioned by the appellant. But it is insisted, that disease and intemperance, within the two years prior to his death, effected a change in his mental condition, and that when the will was made he was insane, or, if not properly insane, was imbecile. The suggestion, that insanity existed in any form, or that the testator's mental faculties were perceptibly impaired at the time of the *factum*, is wholly unsustained by the proof. On the contrary, the proof establishes the fact, that, at that time, his mind was as vigorous and sound as it had ever been. The instrument was prepared by Lot C. Clark, Esq., for many years his legal adviser in relation to his affairs at the north. Mr. Clark was alone with him, in his room at his brother's house, some two or three hours, conversing in respect to his property; receiving his instructions; getting his exact views

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in regard to the provisions of the will, his slaves, and the laws of Virginia and North Carolina as to them; and in drawing the instrument as it was finally executed. All the directions for drawing it were given by the decedent without a suggestion from any other person. He exhibited a will made by him the year before, which had been drawn by Judge METCALF, the surrogate of the county, and suggested the alterations he desired made, assigning his reasons therefor. He named as witnesses, Dr. Edgar, for many years his attending physician when visiting at the north, and Judge WINANT, a friend from boyhood, and requested Mr. Clark himself to sign as a witness. According to the testimony of Mr. Clark, he "was as clear in mind and faculties as he had ever known him;" "his mind was perfectly sound and clear." Dr. Edgar, long familiarly acquainted with his physical constitution, and habits, and mental characteristics, "considered him of sound mind;" and Judge WINANT, the other subscribing witness, concurred with them in opinion. Judge WINANT, after the will was executed, conversed with him at large, respecting his health, and in reference to internal improvements, in which he was interested, in Virginia; in which conversation, he indicated no defect of mental capacity, but full intelligence. He subsequently dined with the family. In addition to this proof, eight witnesses, residents of Virginia, knowing him well for many years, testified, that, down to his leaving Deep Creek for the north, some ten days before the will, his mental condition remained as good as they had ever known it; and Dr. Anderson, called as a consulting physician three days after the will, represented his "intelligence to be perfect." This evidence, which was wholly uncontradicted, tends to but one conclusion,—that, instead of the decedent being a person of permanently disordered intellect at the execution of the will, there were no sensible indications that his rather unusual powers of mind had even begun to decay. He was, it is true, broken in health, having from youth been a sufferer from gout, which was hereditary, and which at length caused an affection of the heart, and dropsy, the latter diseases developing themselves in connection in the spring of 1859. Such constitution as he had was nearly broken down, and, though death was not to be im-

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mediately apprehended, the issue, as the physicians who examined his case some three years after the will expressed it, "was merely a question of time." But no one intimates, that his bodily infirmities had then, if ever, produced any mental disturbance, or enfeebled his intellect in any appreciable degree. Neither has the suggestion any foundation, that indulgence in intoxicating liquors had then impaired his mind. It appears, that, although not totally abstaining, he had, for most of his life, been abstemious in the use of liquors. A year or two before his death, he indulged in a more free use of them, but not, apparently, to excess, at least, before the summer and fall after the will. In 1858, he spent the months of May, August and September at Rossville, where he could not have drunk to any marked extent, for no one suggests that he was ever under the influence of liquor in the slightest degree. Prior to his visit to the north in 1859, he was shown to have been partially affected by it in two or three instances in Virginia, but was never seen intoxicated. Nor was he under its influence, to any extent, when the will was made. In view of these facts, there is no color for saying, that his indulgence in intoxicating liquors, previous to the *factum*, had affected his mind, or his capacity to make a will. Nor, if it were at all important, does the evidence warrant the conclusion, that his use of stimulants during his stay and illness, at Rossville, after the will, reduced his mind to a state of general incapacity for the performance of a testamentary act. Such a conclusion is at war with the general facts of the case. There is no pretense, that his drinking (however excessive it may have been) incapacitated him for business, or prevented him from attending to and controlling his business affairs. It indisputably appears, that his business operations went on as actively as ever, under his direction; and no matter relating to his affairs or property, north or south, however slight, any body ventured to touch without his previous authority. Those who speak most unfavorably of his habits, represent him as constantly exercising memory, will, discrimination, firmness, and all the attributes of perfect intelligence. The habit of drinking undoubtedly grew on him as he sunk under his complicated ailments, and it may have tended, in some degree, to weaken his mind; but, down

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to his departure for Virginia, some two months before his death, nobody pretends that he was imbecile. Indeed, the evidence distinctly indicates, that, up to this time, he retained nearly his full strength of intellect.

The will, then, is not impeachable on the ground of testamentary incapacity. There is no room to doubt that when it was executed, the testator was fully competent. Bodily disease may have abated some of the former elasticity of his mind, but it was in no way *diseased* or even in an incipient state of decay.

2. There being capacity, was the will the free act of the decedent, or was it the result of undue influence, exercised by his brother, the principal beneficiary? This latter question was not argued with any apparent confidence, by the appellant's counsel, and I cannot well see how it could have been. Undue influence must be an influence exercised by coercion, imposition or fraud. It must not be such as arises from the influence of gratitude, affection or esteem, but it must be the ascendancy of another will over that of the testator, whose faculties have been so impaired as to subject him to the controlling influence of force, imposition or fraud. *Gardiner v. Gardiner*, 34 *N. Y.* 162; *Dean v. Negley*, 41 *Penn.* 312; *Small v. Small*, 4 *Greenl.* 220; *Trumbull v. Gibbons*, 2 *Zab.* 117. Moreover, the exertion of the influence upon the very act must be proved, and it will not be inferred from opportunity and interest. *Carroll v. Norton*, 3 *Bradf.* 291, 320; *Clapp v. Fullerton*, 34 *N. Y.* 190. I can discover nothing in the record that brings the case within the rules. The circumstances anterior to and attending the execution of the instrument are inconsistent with any other hypothesis than that it was the product of the decedent's own will, and not of the force, fraud or undue influence of any other. The fact is unquestioned that he was a man of more than ordinary vigor of intellect, of great firmness, self-reliance and tenacity of purpose, and it is clear from the evidence, that he retained his unusual powers of mind down to the period of making the will. He was not, therefore, in a condition to be exposed to undue influences. But the case is barren of evidence of any direct influence—much less that improper influence which will vitiate a testamentary act

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—exercised by the brother to procure the will. It may be that the decedent was unjust to his son, the appellant, in the disposition of his property, and that the brother should not have been selected as the chief beneficiary, but there is nothing rising to the dignity of proof of any undue influence or contrivance on the part of the latter to effect the result. In its dispositive parts, affecting the son and the brother, the instrument was similar to one made by the testator, the fall previously, at Rossville, except that the annuity to the son was reduced from fourteen hundred dollars to seven hundred dollars. It is possible that the brother knew what this will of 1858 contained; but there is nothing to base a conjecture upon that he interfered in any way to bring it about. As to the will in question, the proof is equally decisive as to non-interference on the part of the brother. It appears, conclusively, that the alteration of the will of 1858, by halving the son's annuity, was in accordance with a design of the testator, conceived in Virginia the winter previously; a design and result over which the brother could have had no possible influence on the nature of the case. The instrument was drawn in the room of the decedent, he being alone with Mr. Clark, his counsel. The instruction proceeded solely from him. The brother was not present at any time during the two hours spent in the act. He knew that the testator was making his will, as did the testator's sister, Mrs. Guyon, who was in the house at the time; but that he was any more cognizant of the contents of the instrument being executed than the sister, there is not the slightest proof. True, the *factum* was at his house, but that was the decedent's only home and resort at the north. There was some evidence, also, that he conveyed the message to Mr. Clark to come and draw the will, but his agency in respect to that message was not only natural, but affirmatively shown to have been in obedience to the wish of the decedent conceived in Virginia before starting for the north. In view of this state of facts, there is no ground for alleging that the decedent, in publishing the instrument and dictating its contents, was not acting of his own free, uninfluenced will and wishes.

There is much evidence in the case of matters transpiring at

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Rossville, subsequently to the will. An allusion to it is unimportant. The point of inquiry as to testamentary capacity and the exercise of undue influence or fraud is, before or at the term of the *factum*; subsequent occurrences cannot affect the legal aspects of the case.

I am of the opinion that the questions of fact involved were rightly decided by the surrogate, and that the judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed, costs to be paid out of the estate.



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December, 1864.

An appellant cannot, on appeal, for the first time object that the court directed verdict for the defendant, when there was a question for the jury. A request to submit the question to the jury must be made at the trial.*

An instrument not under seal,—*e. g.*, a promissory note,—may be delivered to the party in whose favor it is drawn, upon a condition; so that until performance of the condition he acquires no right to enforce it.†

Parol evidence is admissible to show that notes received by one party in exchange for notes given by him to the other were mere memoranda and not promises, and therefore formed no consideration for the notes he gave.‡

Erastus B. Seymour and William Wells sued Harrison O. Cowing, George Benson, J. Shedr Buell and James M. Willard, in the Buffalo superior court, to recover on two promissory notes made by the defendant, Harrison O. Cowing, to George Benson, and indorsed by him to the defendants Buell & Willard (who were partners in business, in Buffalo), from whom they passed by subsequent indorsements to the plaintiffs.

* But resisting a motion for a nonsuit, though it is not equivalent to asking a direction for a verdict, is equivalent to asking that the case be submitted to the jury. *Slade v. McMullen*, 45 *How. Pr.* 53.

† Compare *Brckett v. Barney*, 28 *N. Y.* 333.

‡ See *Turnbull v. Osborn*, 11 *Abb. Pr. N. S.* 200.

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The answers alleged that the notes were accommodation notes, made to Benson, with the agreement that the said notes (together with two others, made at the same time), should be used only to borrow money at lawful interest, for a specified purpose, and should not be put into the market to be sold or otherwise negotiated on usury; but contrary to such agreement the notes were transferred by Benson upon a usurious agreement, and the proceeds misapplied; of all which facts plaintiffs had notice before they took the notes.

At the trial, the defendants proved that on October 20, 1856, and before said notes were made, Benson had applied to Cowing to borrow his note for about four thousand dollars, or to make an exchange of notes, both of which Cowing declined. On the day of the date of the notes Benson called on Cowing again, and told him he could not get along without his paper, and requested him to make some notes. He proposed to leave with Cowing his [Benson's] notes, corresponding with the notes Cowing should let him have, as memoranda of the transaction. Cowing told him he might do as he pleased about leaving his [Benson's] notes; that if he left them he [Cowing] should hold them as memoranda and would put them in his safe; that all he wanted was that Benson should take up his [Cowing's] notes at maturity. That thereupon Cowing made the four notes above described and delivered them to Benson, who thereupon made four notes corresponding in amount and time and place of payment with those made by Cowing, and delivered them to Cowing. Cowing put the notes made by Benson into his safe, but made no use of them; and although he kept a bill-book, he did not enter these notes in it.

The defendants also proved that Benson procured the notes to be discounted by the plaintiffs at the rate of twelve per cent. per annum. That Buell, solely for the accommodation of Benson, and without the knowledge or consent of Willard, and without the scope of the partnership articles, indorsed on the notes the name of said firm, of which fact the plaintiffs had notice at the time they received the notes.

The court directed a verdict in favor of the defendant Willard; also a verdict against the defendant Cowing, for the amount of the notes and interest; and against the defendant

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Buell, for the amount paid by the plaintiff to Benson, and interest. Cowing and Buell separately excepted. The court suspended judgment, and ordered the exceptions to be heard in the first instance, at the general term.

The superior court, at general term, held that parol evidence to qualify the delivery was admissible, citing *Chester v. Bank of Kingston*, 16 *N. Y.* 336; and that the evidence showed at most a delivery of the memorandum notes by way of indemnity. The court therefore set aside the verdict, and ordered a new trial, with costs to abide the event.

Plaintiffs appealed to this court.

M. A. Whitney, for defendants, appellants.—That the transaction was one contract in writing. 2 *Pars. on Cont.* 14; *Hill v. Muller*, 3 *Paige*, 254; *Van Horne v. Crain*, 1 *Id.* 455. Parol evidence is admissible. 1 *Cal.* 358; *Erwin v. Saunders*, 1 *Cow.* 249, and cases cited; *Payne v. Ladue*, 1 *Hill*, 116; *Eaves v. Herderson*, 17 *Wend.* 190; *Ely v. Kilborn*, 5 *Den.* 514; *Cow. and Hill Notes to Phil. Ev.* 1460; *Brown v. Hill*, 1 *Den.* 400; *Thompson v. Ketchum*, 8 *Johns.* 190; *Fitzhugh v. Bunyan*, *Id.* 375; *Wells v. Baldwin*, 18 *Id.* 44; *Chester v. Bank of Kingston*, 16 *N. Y.* 336. A deed or an instrument cannot be delivered to a party as escrow. Such delivery is absolute. *Arnold v. Patrick*, 6 *Paige*, 310; *Gilbert v. N. A. Fire Ins. Co.*, 34 *Wend.* 23; *Lawton v. Sagar*, 11 *Barb.* 349. The notes were given upon a valid consideration, and the purchase of them at a discount by the plaintiffs was not usurious. *Rice v. Mather*, 3 *Wend.* 61, and note *a*, and cases cited; *Cobb v. Titus*, 10 *N. Y.* 198.

Henry W. Rogers, for plaintiffs, respondents;—Cited 2 *Phil. Ev.* 4 *Am. ed.* 675; *Ely v. Kilbourn*, 5 *Den.* 516; *Miller v. Gambia*, 4 *Barb.* 146; *Goddard v. Cutts*, 2 *Fairf.* 440, 442; *Chester v. Bank of Kingston*, 16 *N. Y.* (opinions of Judges COMSTOCK and PAIGE), 341, 343; *Chit. on Cont.* 3. 4. As to what constitutes due execution and delivery, 1 *Greenl. Ev.* § 284. As to consideration, *Chit. on Bills*, marg. p. 73.

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MULLIN, J.—The only question on the trial, and the only one before us for decision, is whether Cowen received the notes of Benson in exchange for the four notes delivered by him to Benson. If he did, the direction at the trial was right. If he did not—if they were received merely as memoranda of the date, amount and time of payment of the notes delivered by Cowing, then there was no exchange, and consequently no consideration for the notes in suit.

There was no conflicting evidence in regard to the arrangement concerning the notes, and the court was right, therefore, in ordering a verdict. If the arrangement proved was susceptible of two constructions, it was for the court to construe it so as to give effect to the intention of the parties. If there was any question for the jury, it was the duty of the parties to ask that the case be submitted to the jury. No such request was made; they acquiesced in the action of the court, and they cannot now be heard to allege that there was any question withheld from the jury which should have been submitted to them.

We must treat the question as one of law, and that question is whether, on the facts proved, the agreement was one of exchange of notes, or whether it was a loan of the notes of Cowing, and Benson's were left as memoranda merely.

Before the notes in question were made, Benson applied to Cowing to borrow his notes for some four thousand dollars, which Cowing refused to lend. The application was again renewed on the day the notes of Cowing were made, and Benson proposed to leave his notes with Cowing as memoranda of the transaction. Cowing told him he might do as he pleased; all he wanted was that Benson should take up his (Cowing's) notes at maturity, and Benson's notes were not used by Cowing.

It is thus shown that an exchange was distinctly proposed by Benson and refused. There is not a particle of evidence to show that Cowing changed his mind. Indeed, no request was afterward made to him to exchange. The subsequent application, and the one in the pursuance of which the notes of Cowing were made and delivered, was that Cowing should make his notes, and he (Benson) would deliver his as memoranda.

If, notwithstanding this arrangement, Cowing had, never-

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theless, treated Benson's notes as operative securities, the judge might have found a change of purpose on the part of Cowing, or have implied a new agreement from the acts of the parties. But there is no act to justify any such inference, and any finding of fact, or any construction of the agreement, by which an exchange of notes is imputed to the parties, is utterly without foundation in law or in fact.

It was competent for the parties to agree that the notes of Benson should be left with and be held by Cowing as memoranda merely. A deed, if delivered to the grantee or person entitled to take under it, becomes at once absolute, whatever the intention of the parties may be. *Arnold v. Patrick*, 6 *Paige*, 310; *Worrall v. Munn*, 5 *N. Y.* 229. But instruments not under seal may be delivered to the party to whom upon their face they are made payable, or who is by their terms entitled to some interest or benefit under them, upon a condition the performance of which is necessary in order to perfect the title of the holder to enforce the contract. *Edw. on Bills*, 186; *Miller v. Gambie*, 4 *Barb.* 146.

Our reports are filled with cases in which, the delivery of notes and other obligations to the payee or obligee being shown to be conditional, the title of the holder was defeated.

It is said that the evidence that the notes of Benson were left as memoranda merely, was incompetent because it contradicted the contract, making it inoperative, when by its terms it was an absolute engagement to pay.

The objection begs the question. Before the rule contended for can apply, it must appear that the contract was a valid agreement in the hands of Cowing. Had it been shown that the delivery was absolute, or had there been no evidence to show it conditional, the presumption of law would have been that the delivery was absolute, and in that case evidence could not be given that it was agreed between the parties differently from the terms of the contract. But until delivery, the contract is wholly inoperative, and if it be shown that the instrument was delivered to take effect only on the performance of some condition, or on the happening of some future event, the contract is not operative and binding until the condition is performed or the event has occurred.

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Such evidence does not alter or vary the contract,—for when the contract takes effect it speaks for itself:—but it prevents a delivery, which, unqualified, would give instant effect to the agreement, from having any other or greater effect than is contemplated by the parties.

If the question as to the meaning of the contract could be treated as one of fact and not of law, the judgment of the general term must nevertheless be affirmed. That court has power to review the findings of fact of the judge at the circuit, and this court in reviewing the judgment can only look into the case, in order to see whether there is any evidence to sustain the findings of the general term. If there is, we must affirm the judgment. If there is none, it is our duty to reverse it.

The evidence fully justifies the action of the general term in setting aside the verdict. If I am right in either of the foregoing positions, there was no consideration for the notes of Cowing, and a recovery thereon by the plaintiff cannot be sustained.

I discover no ambiguity in the language of the case where it says the notes were left with Cowing as memoranda. The word explains itself. Memoranda is defined by WEBSTER to be "*notes to help the memory.*" This is a very different purpose from that of being valid contracts to pay money.

The agreement of the parties can have but one interpretation and that is, that the notes of Benson were not delivered as binding obligations to Cowing. The notes of Cowing were, therefore, without consideration and void. The verdict was wrong. The order of the general term, setting it aside and granting a new trial, was right, and should be affirmed; and, under the stipulation, judgment absolute should be ordered, with costs.

DENIO, Ch. J.—The notes in question having been negotiated to the plaintiffs at a higher rate of interest than that allowed by law, the question was, whether they were operative paper in the hands of Benson, the payee, who negotiated them, at that time. If they were, he had a right to dispose of them at a discount; but if they had their legal inception only at the time of such transfer they were infected with usury.

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The plaintiffs claim that Cowing, the maker, received value at the time of signing them, by taking the notes of Benson, the payee, for equal amounts, and having the same time to mature; and they seek to apply to the case the principle of *Cobb v. Titus*, 10 N. Y. 198. But it was shown by parol evidence that Cowing became the maker of the notes simply for the accommodation of Benson, and did not consent to receive the notes of the latter by way of exchange for those signed by him. It was proved that when Benson offered to leave his notes, Cowing said he might do as he pleased about it; but if he did leave them, he would hold them as memoranda of the transaction, and would put them in his safe; and that all he wanted was, that Benson should take up his (Cowing's) notes at maturity. This, proof, if legal, showed that there was no consideration for the notes sued on until they were negotiated to the plaintiffs. The single question, therefore is,—if that can be said to be a question—whether the defendants were entitled to establish the circumstance stated by parol evidence. The plaintiffs insist that the fact of the exchange of the notes, and the constituting one set the consideration of the other, existed in writing. But that is a mistake. The only writings were the notes of the respective parties. The fact alleged of their connection with each other, and that one set was the consideration of the other, was not shown by any writing. To be sure, each party had the notes of the other, and all the notes were presumed to have been given for value; but that proves nothing to the purpose. Without parol proof, each note would be taken to have been given upon a separate and independent consideration. It may be that they ought to be read together, being between the same parties, and signed at the same time; but no method of reading them would have shown anything as to their relation to each other, or have shown that one was the consideration of the other. To establish that fact the plaintiffs would themselves have to resort to the parol evidence. That evidence, when produced, completely negatived the idea of an exchange of notes. Benson's notes were not negotiated to Cowing, but were given to him to be kept as memoranda; and the consideration expressed on their face was disproved.

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It follows that the defense of usury was fully made out, and that the judge should have directed a verdict for the defendants.

The order appealed from should be affirmed, and judgment final be given for the defendants, pursuant to the stipulation.

All the judges concurred.

Order for new trial affirmed, and judgment absolute for defendants, with costs.

SEYMOUR v. MONTGOMERY.

December, 1864.

An executory sale of an interest in a vessel yet to be built, passes no interest in the vessel when it comes into existence, as against a purchaser after that time having no notice of the previous sale.

Four parties agreed to build a vessel, each to contribute one-quarter of the cost, and each to be one-quarter owner, and two of them to be each entitled to buy the shares of the others. *Held*, that one of them who accordingly purchased the share of another, could not defend an action for the price, on the ground that before building the vessel, the vendor had made an executory sale of the same share to another of the four, and received a part of the price.

Erastus B. Seymour and William Wells, as assignees of Bidwell, Banta & Co., sued Robert B. Montgomery, in the superior court of Buffalo, to recover a balance alleged to be due on the sale of a quarter interest in a vessel.

The facts found by the referee were, that in Feb., 1857, Bidwell, Banta & Co., shipbuilders; Sidney Sheppard, an engine builder; William Dickson, a mariner, and the defendant, Robert Montgomery, also a mariner, agreed to build and equip a propeller, at a total cost of forty-five thousand dollars; each party to own a quarter. Bidwell, Banta & Co. were to construct the hull, Sheppard to furnish the engines, and the others to pay sufficient cash to make all contributions equal; and it was also agreed, that Dickson and defendant were each respectively to have the privilege of buying either or both the two

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shares of the other parties, whenever either of the former elected to do so.

About Feb. 25, 1857, before the propeller was actually commenced, Dickson having elected to purchase the quarter interest of Bidwell, Banta & Co., paid them, beside his cash contribution, one thousand one hundred and eighty-seven dollars and fifty cents on account of his purchase of their interest.

Bidwell, Banta & Co. afterward constructed the vessel, so far as required by the contract; and in August or September, 1857, when she was ready for launching, sold and transferred their one-quarter to the defendant, and the defendant paid the purchase money thereon, except nine hundred and ninety-six dollars and thirty-one cents. This balance Bidwell, Banta & Co. assigned to the plaintiffs, who brought this action to recover it. Soon after the sale to defendant, Bidwell, Banta & Co. became insolvent.

Before that sale was made, plaintiffs had notice that Dickson had made the payment above stated, and the defendant declined to pay to plaintiffs the balance sued for, on the ground that Dickson claimed it as a prior purchaser of the same interest. It did not, however, appear that defendant at the time of his agreement for the purchase of Bidwell, Banta & Co.'s share had any notice that they had previously sold it to Dickson.

The answer in the present action set up that Bidwell, Banta & Co. did not own and sell to defendant this quarter interest, but that William Dickson was the owner thereof.

The referee decided that plaintiff was entitled to judgment for said balance, to which decision defendant excepted, and judgment having been affirmed by the court at general term, defendant appealed.

James Sheldon, for defendant, appellant;—Cited *Story on Partn.* § 417; *Watson on Partn.* 78; 2 *Barb.* 439, 608; *Story Eq. J.* §§ 718–61; 2 *Kent*, 626; 3 *C. Rob.* 133; 2 *Dod.* 288.

M. A. Whitney, for plaintiffs, respondents;—Cited *Merritt v. Johnson*, 7 *Johns.* 472; 3 *Kent*, 7 ed. 199; *Coll*, 4 *Am. ed.* 1017; *Mumford v. Nicoll*, 20 *Johns.* 611; *Story Eq. J.* § 1242.

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HOGEBROOM, J.—The plaintiffs made at least a *prima facie* title to the undivided interest of Bidwell, Banta & Co., in the propeller, or the price thereof, by showing a sale and conveyance of such undivided interest by the latter to the defendant, and an assignment to the plaintiff of the unpaid portion of the price.

The defendant, who undeniably owed this debt, undertook to defend this action by showing a prior executory contract for the sale of such undivided interest to William Dickson, and the payment of a part of the price thereof by Dickson to Bidwell, Banta & Co. The answer to this is, that this contract and payment, being before the propeller was commenced to be built, was wholly executory in its character, and passed no title to or interest in the vessel to Dickson, as against the defendant, who had no notice of this contract. *Andrews v. Durant*, 11 *N. Y.* 35.

That such is the general rule is undeniable, at least since the case cited; but it is attempted to take the present case out of the operation of this rule, by the fact, that Bidwell, Banta & Co., Dickson and Montgomery were, with one Sheppard, joint proprietors of the vessel, and in fact jointly concerned in the construction thereof at their joint expense; that under the arrangement between them for such construction, Dickson and Montgomery were entitled to purchase of the other parties their interest therein, and that by reason of this arrangement the parties were in effect partners, and each bound to take notice of the interest of the others therein, and its extent, both legal and equitable.

But I think they were not partners, but only part owners of the propeller; the agreement was that each should contribute the sum necessary to pay for one-quarter thereof, and each should be one-quarter owner; they contributed this, or were to do so, in separate sums, and were, I think, to have a several though undivided interest in the vessel. It is doubtful indeed whether any but Bidwell, Banta & Co., who were the builders of the hull, and in possession thereof and interested to the largest amount in value in the vessel, were the legal owners thereof, until a conveyance thereof by them, although the equitable interests of the other parties would doubtless be preserved as

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to all parties who dealt with Banta & Co., with knowledge of such equitable interest. Of the right of Dickson to purchase of Bidwell, Banta & Co., Montgomery was of course apprised by the contract. He had the same right himself, but of the exercise of that right he was wholly unapprised, and in regard to it, I think was not bound to inquire, unless some circumstances beyond the mere terms of the contract were brought to his notice, to put him on inquiry. None such existed, and I think the consequence was, that, however inequitable it was for Bidwell, Banta & Co., with a part of the price of their interest in the vessel in their pockets, paid to them by Dickson, to sell to another person, yet if such sale and conveyance to Montgomery were in fact made, it vested in the latter a title to the property, and obliged him to pay the price, unless Dickson was in some way made a party to the suit, or intervened in his own behalf. The price is nevertheless due from Montgomery, and collectible by Bidwell, Banta & Co., or their assignees. And it must be determined by some future litigation whether the plaintiffs after collecting it are to respond to Dickson for it in whole or part. Under the present state of the proof, and as between the present parties litigant, I think the judgment of the court below was right, and should be affirmed.

DENIO, Ch. J.—The plaintiffs, it is true, can claim no greater right than that which Bidwell, Banta & Co. could have claimed. The question is whether, under the facts found, the defendant can claim to have deducted from the purchase price of the one-quarter interest purchased by him, the amount which Dickson had paid on account of his inchoate purchase of the same quarter interest. There is no privity between him and Dickson, which would enable the defendant to avail himself of that payment, by way of set-off, or recoupment. If he can have the benefit of it in any way, it must be on the ground of a partial failure of title in Bidwell, Banta & Co. If it could be said that these parties did not own the whole quarter, but that Dickson owned a part of it, to the extent of his payment, then there would appear to be such partial failure of the title. But there are not sufficient facts found to show that any interest passed to Dickson. It is not shown why he did not com-

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plete his purchase. If it was on account of his failure to complete the payment, no interest in the subject passed to him. So if, without fault on his part, Bidwell, Banta & Co. refused to complete the sale to him, or put it out of their power to do so, by disposing of the quarter to the defendant, still no interest passed to Dickson. Bidwell, Banta & Co. became liable to repay him the money he had advanced on account of the purchase, and, perhaps, damages, for not performing on their part, but the title of the property would not be changed. The sale of the quarter to Dickson must be considered executory, and as not conferring any title upon Dickson until the payment should be completed. There was nothing existing at that time of which possession could be predicated. The subject was yet to come into existence, and any contract concerning it must, of necessity, be executory, and not executed.

The question, of course, is, who should lose by the insolvency of Bidwell, Banta & Co.; and it must clearly be Dickson, for they had his money in their hands at the failure. The defendant got the whole interest which he bargained for, and he must, therefore, pay the balance of the price which he agreed to give.

The judgment of the supreme court must be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

SHEEHAN v. HAMILTON.

May, 1864.

In an action of a legal nature to recover premises leased forever, subject to a rent charge, upon the ground of a breach of the condition to pay the rent, if defendant pleads an extinguishment of the rent charge by a technical legal merger, the plaintiff may show that in equity no merger has taken place.

Under the Code of Procedure, in such a case, the plaintiff need not bring a separate equity action to have the rent charge declared subsisting. The whole controversy may be decided in the ejectment suit, notwithstanding the facts relating to the alleged merger would have been, before the Code, of equitable cognizance.

Sheehan v. Hamilton.

Eliza Sheehan sued Robert Hamilton, in the supreme court, in ejectment, to recover a lot of land in the village of Saratoga Springs, demised by a perpetual lease from Harmon Livingston to Risley Taylor, in 1823, upon the condition that Taylor and his heirs and assigns should pay to Livingston, his heirs, executors or assigns, twenty-five dollars annually; with authority to re-enter in case of non-payment. Livingston assigned this rent charge, in 1829, to Doctor John Clarke, plaintiff's father, who died in 1846, having devised it to plaintiff and her two brothers. The brothers assigned their interest to plaintiff. The rent having remained unpaid for several years, plaintiff, in 1862, served notice of intent to re-enter; and payment of the rent being still neglected, brought this action.

The defendant was in possession as a tenant under John H. White, who claimed to hold by an absolute title in fee, relieved of the rent charge, by deed from Dr. Clark to Polly Taylor, the widow of Risley Taylor, executed in 1831, and by mesne conveyances from her to the said White. The judge before whom the action was tried, at special term, found as a fact that Dr. Clarke did not intend the rent charge to merge in the fee when the land was conveyed to him; and, as a conclusion of law, that there was no merger; and also that defendant was estopped, by the deeds under which he claimed to hold, from setting up a merger. Judgment that plaintiff recover possession for default of rent was entered. The evidence as to disputed facts was entirely documentary.

The supreme court, at general term, very fully reviewed the facts, and held that the rent charge was extinguished by the unity of possession of the fee in the rent and in the land, in Dr. Clarke, resulting from a conveyance of the land to him in 1831, by the foreclosure of a mortgage made by Risley Taylor; that as this was in the nature of a common law action, the court could not look outside of the deed to him to ascertain whether it was his intention to extinguish the rent; that the inquiry whether such intention existed at the time of the conveyance could be raised only in equity; and that the law presumed that Dr. Clarke intended to pass all his estate and interest in the land, in the absence of express terms in the deed

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from him to Mrs. Taylor, showing an intention to pass a less estate; and the general term reversed the judgment rendered by the special term, and ordered a new trial.

The plaintiff, appealing to this court, has stipulated that judgment absolute be rendered against her, if the order appealed from be affirmed.

J. A. Shoudy, for plaintiff, appellant.

L. B. Pike, for defendant, respondent.

BY THE COURT.—LEONARD, J. [After stating the facts.]—The opinions delivered by two of the justices of the supreme court, at general term, concede—one of them expressly, the other by implication—that it was the intention of Doctor Clarke to keep the rent charge in existence, but deny the right to consider that fact, because it is necessary to invoke a principle of which, it is supposed, a court of equity can alone take cognizance, while the case at law admitted only of the application of common law rules.

This objection lies at the threshold of the case, and may as well be first examined. It means, in substance, that the plaintiff must resort to a separate action, of an equity nature, to have the existence of her rent charge declared, before she can maintain her action to recover the possession of the land for the non-payment of the rent.

The constitution vests the supreme court with general jurisdiction in law and equity. *Const.* art. 6, § 3. That court has all the jurisdiction of the late court of chancery. The testimony in equity cases is to be taken in like manner as in cases at law. *Id.* § 10. It is declared by the Code of Procedure that it is expedient “that the distinction between legal and equitable remedies should no longer continue.” *Vide Preamble to the Code*, and § 69.

The Code permits parties to interpose any defenses by answer which they may have, “whether they be such as have been heretofore denominated legal or equitable, or both.” § 150. No reply to an answer is necessary unless it sets up a counter-claim, but the plaintiff is permitted to prove any mat-

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ter in denial or avoidance of the answer, where it sets up new matter, as the case may require. § 168. It is upon the defendant's motion only that a reply to an answer setting up new matter, not constituting a counter-claim, may, in the discretion of the court, be permitted. § 153.

A defense purely equitable may be interposed to a cause of action strictly legal. *Foot v. Sprague*, 12 *How. Pr.* 355; *Hunt v. Farmers' Loan & T. Co.*, 8 *Id.* 418; *Hinman v. Judson*, 13 *Barb.* 629.

It is no longer allowable to bring an action merely for the purpose of restraining the prosecution of another action. *Auburn City Bank v. Leonard*, 20 *How. Pr.* 193. A defense that a deed absolute on its face was intended as a mortgage, is available in any action. *Despard v. Walbridge*, 15 *N. Y.* 379.

All matters are considered as equitable defenses which would have authorized an application to the court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar. *Dobson v. Pearce*, 2 *Kern.* 1668.

The whole subject was fully examined in this court in the case of *Phillips v. Gorham*, 17 *N. Y.* 270, in which it was held, in an action for the recovery of the possession of land, that the plaintiff could attack a deed under which the defendant claimed title, both upon legal grounds and upon such as before the Code were of purely equitable cognizance.

The answer, in the case of *Phillips v. Gorham*, claimed title by deed from William Phillips, the ancestor of the plaintiff. There was a reply to the answer (then permitted by the Code), which set up that William Phillips, the ancestor, was of unsound mind when he executed the deed, and that it was fraudulently obtained by threats and other improper influences operating on his impaired intellect.

The objection was taken at the trial that the plaintiff was not entitled to avoid the deed for fraud or undue influence, but should have procured a judgment declaring it void, in an action for that purpose, before bringing the action to recover possession of the land.

The plaintiff had a judgment and verdict, notwithstanding the objection; and on appeal to this court that judgment was affirmed, and the principles of equity and law

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combined on the trial of that action were fully upheld. It is unnecessary to travel over the same ground now at any greater length.

The case of *Dobson v. Pearce*, *supra*, was referred to as invoking the same principle, and was approved.

These references sufficiently show that the plaintiff in this action might lawfully establish upon the trial any ground of avoidance, whether of a legal or equitable nature, against the technical rule insisted on by the defendant, that there had been an extinguishment of the rent charge. She was not obliged by her pleadings to anticipate that the defendant would deny her claim for rent, or set up that it was extinguished; nor was she required to resort to a prior action in equity to have her rent charge declared to be an existing estate.

Was there an avoidance of the technical extinguishment of the rent by the union of the two estates in Doctor Clarke, by competent evidence of his intention that it should not be extinguished?

The judge at the trial has found that it was not intended that the two estates should merge, and that there was no merger. The term "merge" is not used with strict accuracy, inasmuch as the estate in the rent charge and that in the land are of equal degree, and estates of equal degree do not merge. *Bouvier L. Dict. tit. Merger.*

There is a unity of possession where two estates of equal degree meet, or are combined in the same person.

The meaning is, however, substantially the same, whether the result be called a merger or an extinguishment; and as applied by the learned justice at special term, cannot be misunderstood. It is equally comprehended, whether he says that there was no intent to merge, or no intent to extinguish, the rent. The term merger was probably used in its common acceptance, in this instance.

The master's deed to Doctor Clarke was in the usual form, and would have conveyed a fee if the mortgagor had possessed one. It conveyed, in fact, only such an estate as Risley Taylor owned; that, we have seen, was subject to the payment of an annual rent. There was then an unity of possession in Doctor Clarke of the fee of the rent charge and of the land, and the

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rent became thereby extinguished, unless it was his intention that it should be kept alive.

Doctor Clarke conveyed the same estate to the widow of Risley Taylor very shortly after he had acquired it, by a quit-claim deed in which it is stated that he conveys as fully and amply as he had received the title by the deed from the master, to which an express reference is made. While it is true that these deeds are sufficient to pass a clear and unincumbered title to the land in fee simple, they are not inconsistent with a different intention, if it can be shown by legal evidence that such different intention actually existed.

The objection much relied on by the defendant arises from the statute, which provides "that every grant or devise of real estate, or any interest therein hereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of such grant." 1 R. S. 748.

All the estate of Doctor Clarke is deemed to have passed by the grant. *Nicoll v. New York & Erie R. R. Co.*, 12 N. Y. 129.

The deed from Mrs. Taylor, made in March, 1832, about four months only after she had received the title by the deed from Doctor Clarke, conveying the premises to Selah Hart, incorporated the lease from Harmon Livingston to Risley Taylor by a reference to and recital of it; and declared that the premises were subject to the rent and covenants of the original lease. All the subsequent deeds to John H. White contain the same recital of the lease and statement that the premises are subject to the rents and covenants therein contained.

The consideration expressed in the master's deed to Doctor Clarke is nine hundred and sixty dollars, and the deed from him to Mrs. Taylor is for the consideration of nine hundred and ninety dollars, while in the short time of about four months she conveyed, for the consideration of two thousand five hundred dollars, to Selah Hart.

The statements and recitals of Mrs. Taylor's deed are clear admissions of the highest grade of evidence that the rent charge had not been previously extinguished.

It was an admission that affected the value of the premises

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unfavorably and reduced the price, and entered into the consideration paid by the purchaser. It would not have been made, according to the usual motives of human action, unless it had been in accordance with the existing actual fact.

We shall give the due force and effect, only, to the admission contained in Mrs. Taylor's deed, by holding that the omission to limit the estate granted by the deed from Doctor Clarke to her, so as to continue and preserve the rent charge by express language, was the result of accident or mistake.

The statute relied on by the defendant creates no bar to the reformation of a deed on the ground of accident or mistake.

Story Eq. Jur. § 156, *et seq.*

The failure of a contract or deed to express the real intention of the parties by reason of accident or mistake also forms an exception to the rule that parol evidence shall not be admitted to vary the effect of a written instrument.

On these grounds courts of equity interfere to reform any written instrument as between the original parties, and those claiming under them in privity. *Carver v. Jackson*, 4 *Pet.* 1, 82; *Story Eq. Jur.* § 165.

The deed of Mrs. Taylor, and also that from Selah Hart, her grantee, were recorded long before White acquired the title, and in the deeds of both Mrs. Taylor and Selah Hart, the lease is recited, and the premises are stated to be subject to the rents and covenants thereof.

White acquired title in 1852, under a master's deed on a foreclosure sale of a mortgage made by Nelson Hart, the grantee of Selah Hart. He also received a conveyance of the same land subsequently from Nelson Hart, in which the lease is recited. White was thus in privity of estate and was bound by the admissions of the former owners. The admissions are in disparagement of the title, and they bind those who succeed them in the estate. 1 *Greenl. Ev.* § 189, 190.

Like the case of a deed made subject to the lien of a prior mortgage, the grantee and his assigns are estopped by the admission in the deed from denying its existence. *Horton v. Davis*, 26 *N. Y.* 495; *Jumel v. Jumel*, 7 *Paige*, 591.

The judgment of the special term was correct, and should be affirmed, and that of the general term reversed, with costs.

 Sheridan v. House.

All the judges concurred, except MORGAN and HUNT, JJ.

Order granting new trial reversed, and judgment of special term affirmed with costs, judgment of general term reversed.

 SHERIDAN v. HOUSE.

December, 1868.

The uncertainty which makes a remainder contingent is uncertainty as to who will take at any given time, if the precedent estate should then terminate. If there are persons in being who would be entitled to take if the precedent estate should presently determine, their interest is a vested future estate, under the revised statutes, notwithstanding that it may be liable to be defeated,—*e. g.*, by the death of such a person, before the precedent estate actually determines.*

A vested estate in remainder, although it be liable to be defeated by a subsequent event, is a legal estate, assignable and subject to sale on execution. †

Under a deed of lands to A. for life, and after his death, then to his heirs and assigns for ever, the children of A. during his life have a vested future estate in remainder, which is not made contingent by the fact that it is liable to be defeated or modified by death of any of them, or the birth of other children, during his life. ‡

The doctrine of estoppel by warranty applied. §

* Compare *Moore v. Littel*, 41 *N. Y.* 66; where this decision is explained as founded on the provisions of the revised statutes. *S. P.*, *Manice v. Manice*, 43 *N. Y.* 303; modifying 1 *Lans.* 348. See also *Rome Exchange Bank v. Eames*, pp. 83, 98 of this vol. This remainder is an estate of which the remainder-man's wife is dowable. *House v. Jackson*, 50 *N. Y.* 161.

† And so is a reversion, though contingent or defeasible. *Woodgate v. Fleet*, 44 *N. Y.* 1; *S. C.*, *Abb. Pr. N. S.* And even if contingent, the remainder would be alienable. *Moore v. Littel*, 41 *N. Y.* 66. See also *Stover v. Eycleshimer*, in this volume.

The case of *Carmichael v. Carmichael*, vol. 1, p. 309 of this series, is not in substance inconsistent with this case, although its language does not pursue the distinction here pointed out, for in that case the child under whom the plaintiff claimed actually died during the life estate. Compare *Livingston v. Greene*, 53 *N. Y.* 113; affirming 6 *Lans.* 50.

‡ As to the different effect in case of a remainder given to "the children" instead of to the heirs of A, see *Sherman v. Sherman*, 3 *Barb.*

§ Approved in *Moore v. Littel*, 41 *N. Y.* 66.

Sheridan v. House.

Bernard Sheridan and Amanda M. House submitted a controversy for the decision of the supreme court, without action, arising on these facts. In 1832 Samuel Jackson conveyed land to his son John, "for and during his natural life, and after his death, then to his heirs and their assigns forever." The deed contained a covenant for further assuring the title to the premises to the heirs of John Jackson, "after his natural life," and the grantor warranted the premises to John Jackson, "for and during his natural life," and then to his heirs and their assigns.

John Jackson then had thirteen children. One of them died prior to 1844, and in that year John Jackson executed a deed purporting to convey the whole land to his twelve surviving children, describing them as his children and heirs presumptive. One of these children died before 1848, and in that year John Jackson and wife executed a deed, with full covenants, purporting to convey the whole farm to his eleven surviving children, of whom Richard Jackson is one.

In 1849, the grantees in the last mentioned deed undertook to partition among themselves the whole tract conveyed by Samuel Jackson, and executed two sets of partition deeds, the first of which was in question in *Moore v. Littell*, 40 *Barb.* 488. The second set of partition deeds is that in question in this action.

By these deeds the premises in question were conveyed to Richard Jackson by his surviving brothers and sisters, with covenants for quiet enjoyment to him as against the grantors, their heirs and assigns.

In September, 1856, the sheriff sold the estate of Richard

385; *Heywood v. Hassall*, 2 *Rich. So. Car.* 510; *Thompson v. Luddington*, 104 *Mass.* 193; *Prowitt v. Rodman*, 37 *N. Y.* 42. To "heirs of the body." *Lemarks v. Glover*, 1 *Rich. Eq.* 141. To "heirs," *Heard v. Horton*, 2 *Den.* 163; *Vanorsdall v. Vandeventer*, 51 *Barb.* 187; *Feltman v. Butts*, 8 *Bush Ky.* 115; *Campbell v. Rawdon*, 18 *N. Y.* 412; *Kingsbury v. Rapelye*, 3 *Edw.* 1, 9; *Rogers v. Rogers*, 3 *Wend.* 503; *Scott v. Guernsey*, 48 *N. Y.* 106; affirming 60 *Barb.* 163; *Conklin v. Conklin*, 3 *Sandf. Ch.* 64; *Bundy v. Bundy*, 38 *N. Y.* 410; affirming 47 *Barb.* 135; *Kiah v. Grenier*, 1 *Supreme Ct. R.* 388.

Whether the fact that the gift is in trust affects the vesting, see *Knox v. Jones*, 47 *N. Y.* 389; *Van Wyck v. Bloodgood*, 1 *Bradf.* 154, 175.

Jackson, on execution, and the purchaser conveyed to the defendant, who claimed under this sheriff's sale. Subsequently and in 1861, John Jackson died. One of the eleven children, Fanny, had died before him, leaving an infant child. After John Jackson's death, his children effected a partition by an action, to which, however, the defendant was not made a party; and the judgment in that action made actual partition allotting the lands in controversy in the present proceeding to the plaintiff. One share was also allotted to the child of Fanny, deceased.

The supreme court held that the children of John Jackson had a contingent estate in remainder during his lifetime, and should this estate be deemed alienable, it could not be sold on execution, for the statute as to judgments and executions could not be extended to future estates in expectancy.

D. P. Barnard, for the appellant.

G. W. Paine, for the respondent.

GROVER, J. [delivered an opinion to the effect that as during the father's lifetime it was uncertain which, if any of the children would survive their father, and therefore uncertain which, if any, of the children would acquire any estate in the land, the remainder limited by the deed from Samuel to John, was therefore a contingent remainder, and could vest in no one until the death of John, by which event his heirs would be ascertained, and the remainder vest.

And that since, under the code as well as by the revised statutes, nothing can be sold upon execution as real estate, except a legal estate therein, the children of John Jackson had no title during his lifetime, which could be thus sold, except his life estate conveyed by him to them. The learned judge then proceeded as follows:]

It is clear that neither of these grantors, [the parties to the partition] nor any person claiming under them, by title derived subsequent to their conveyance to Richard, could assert, as against him or those claiming under him, any title to the land in question. They would be precluded from so doing

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by the covenant of warranty in the deed to Richard. The title they acquired upon the death of John Jackson by the operation of this covenant inured to and vested in Richard Jackson and his grantees. This is the result of the application of the unquestioned rule, that a title subsequently acquired by one who has granted the land with covenant of warranty inures to the benefit of his grantee. Whether this principle is based upon an estoppel imposed upon the grantor by reason of his covenant, or a rule adopted to avoid circuity of action, has been discussed by counsel, but both concede the rule.* I am unable to perceive any difference in the present case, whichever may be the true reason. This covenant of the children of John Jackson in the conveyance to Richard, ran with the land, and had not been broken in 1856, at the time of the sale and conveyance by the sheriff, under which the defendant claims. It then constituted a part of Richard Jackson's title to the land, and passed to the purchaser at a sale by the sheriff, upon an execution issued upon a judgment against him. *Sweet v. Greene*, 1 *Paige*, 473; *Kellogg v. Wood*, 4 *Id.* 578. This covenant, therefore, inures to the benefit of the defendant, and makes her title perfect to nine-elevenths of the land in question. As to the one-eleventh which vested in the infant child of the grantor that died, this reasoning will not apply. That child took the eleventh under the deed from Samuel to John Jackson, and not as heir of his mother,—consequently her warranty is not binding upon him. There is nothing to prevent his asserting his title to one-eleventh of the land in question; at any rate, the defendant has not acquired his interest.

The further question must be determined, whether the plaintiff has acquired it. It appears from the case that after the death of John Jackson, a partition was made by action between his heirs, to which this infant child was a party, by which the land in question was adjudged to Richard Jackson. This judgment would, while in force, effect a transfer of the interest of this child in such lands to Richard; and it, together with the eleventh, acquired by him upon the death of John

* Compare *Moore v. Littel*, 41 *N. Y.* 66.

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Jackson, became vested in the plaintiff by virtue of the sheriff's sale to him made after the happening of these events.

It is claimed by the plaintiff's counsel that the entire partition made by the children during the life of John Jackson, and the conveyances made to effectuate it, became void by reason of the death of one of the children during his life, and the acquisition of one-eleventh by the infant, who was not bound by such partition and the conveyances. It is true that the infant was not bound, but this did not at all impair the validity of the partition or the conveyances as to the others. They were bound, and none of them could claim any interest in any parcel previously conveyed with warranty. The right of each acquired at the death of John, at once vested in the grantees.

It follows, that the plaintiff is entitled to judgment for two-elevenths, and the defendant for nine-elevenths, of the land in question.

The judgment of the supreme court should be modified accordingly.

WOODBUFF, J., expressed his views as follows:

It is not questioned, that, by the grant made in 1832, by Samuel Jackson to John Jackson, for and during his natural life, and after his death, then to his heirs and their assigns forever, the immediate grantee took an estate for life only, and that a remainder in fee was limited to such persons as were, at his death, his heirs at law.

Nor is it questioned that by the conveyance of John Jackson to his children, they acquired, as tenants in common, each an estate for his life in one undivided eleventh part of the land, and that the limitation in remainder gave them, as his heirs presumptive, an estate, interest or expectation, which at his death, they being still alive, would become in them severally an absolute fee.

If that estate, interest or expectation was alienable, then the deed of partition executed by the eleven children operated to place Richard Jackson (one of their number) in the same relation to the lots assigned and conveyed to him in severalty, in which he was before that deed, to the undivi-

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ded one-eleventh of the whole property; that is to say, he held an estate for the life of John Jackson in the lots so allotted and conveyed to him in severalty, and he would be entitled to the fee of each one-eleventh part thereof, provided, in respect to each eleventh, the grantor thereof should survive John Jackson.

The partition deed was something more than a release. *Miller v. Emans*, 19 N. Y. 384, 388. As between tenants in common it would operate as a grant; it granted with covenants for quiet enjoyment.

True, if he, or either of his grantors in partition, died before John Jackson, that might defeat the title to the one-eleventh purporting to belong to, or be conveyed by, the one so dying, but that is all.

The technical inquiry as to what, and between whom, a mere release at the common law may operate, is not material; here were words of grant and conveyance, and if the grantors had an estate or interest which was alienable—beyond their interest for the life of John Jackson—then this partition deed operated to convey it. The parties were in possession by virtue of the estate *pur autre vie*. They each held the relation to him in which, if they survived him, their estate would be a fee simple in one-eleventh each, and if that fact gave them an alienable estate or interest, no rule of law, technical or otherwise, forbade that their conveyance to one of the tenants in common having a like estate or interest, and being in possession, should be effectual.

On the other hand, if the several grantors in that deed had no estate or interest in the land which was alienable, it conveyed nothing, and considering that deed simply as a conveyance, the defendant here has no estate in the lots, because the estate which she claims was derived from a conveyance to her, or to her grantor, before the death of John Jackson. Whether that deed operated as an estoppel, so as to assure to Richard Jackson the fee, when in fact the grantors did survive John Jackson, and thus assured to her the title which they had proposed to convey, I shall not consider.

I prefer to rest my conclusions upon the answer which should be given to the question whether the children of John

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Jackson had, before his decease, an alienable interest or estate in the premises, and by this to test the effect of the partition deed and the validity of the defendant's title. And in my opinion the consideration of this question will also determine whether, if alienable, the interest or estate of Richard was subject to levy and sale upon execution against his property.

The circumstances of the present title would not at the common law have presented the question. The abrogation of the rule in Shelley's case has created a state of things which at the common law could not exist; thus by the common law under the rule in Shelley's case, a grant to A. for life with remainder to his heirs, gave to A. a fee; no question under the law of remainders could therefore arise under such a grant. And that is the case now before us in which Samuel Jackson conveyed to John Jackson for life with remainder to his heirs. On the other hand, a grant to A. for life with remainder to the heirs of B. did present a case to which the law of remainders was of course applicable.

In considering the effect of the grant under consideration, made since the rule in Shelley's case was abrogated, we may seek for an analogy in the example last named, to wit, a grant to A. for life with remainder to the heirs of B.

In such case the limitation over to the heirs of B. is by the common law wholly contingent. It is not only impossible during the life of B. to say who will be his heirs, and hence, who will be entitled to claim under the limitation, but if B. is living at the death of A., the remainder over will wholly fail, because it cannot take effect at the expiration of the precedent freehold estate upon which it is limited. This last result is now prevented by our revised statutes (1 R. S. 725, § 34), and therefore the limitation over is operative, and whenever B. dies it will take effect for the benefit of those who may be his heirs. In such case, however, so long as B. lives (A. being also living) there can be no vested estate in remainder under our statutes, because there are no persons in being who would have an immediate right to the possession of the land upon the ceasing of the precedent estate; that is, if A. were to die to-day, it would still be uncertain who are the heirs of B., and, therefore, there is no one who under the grant is entitled to the possession.

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But now suppose B. dies, then the estate would vest, and for the reason that there are now persons in being, who, if A. dies. **to-day**, will be entitled to immediate possession. Whether the estate or interest can be defeated by the death of such persons, or by any other future event or not, their interest is vested according to the very terms of our statute.

It is this precise alternation of circumstances which furnishes examples within the contemplation of our statute in its definition of a "vested future estate" and a "contingent future estate."

1. An estate is vested where there is a person in being who will take if the precedent estate then terminates.

2. An estate is contingent while the person to whom . . . it is limited is uncertain,—i. e., while it is uncertain who will take if the precedent estate then terminates.

One definition is the converse of the other, and they are to be read together.

In the case supposed, then, on the death of B. (A. being still alive), the heirs of B. are in a condition to take if A. should then die, and their estate is, by the terms of the statute, a future vested estate.

This, in my judgment, illustrates the new case made by our statute abrogating the rule in Shelley's case.

Thus John Jackson took a life estate; and every child of his, bearing to him such relation, that, at any moment, he would, if John Jackson then died, be entitled to immediate possession, and to hold in fee, had a "vested future estate" under our statute. It was vested, because by the death of John Jackson the precedent estate terminates, and such child, then in being, becomes *eo instanti* entitled to immediate possession, which is the precise character of one who in the language of our statute has a future vested estate.

This vested estate might be defeated, because such child might die before his father; but the statute has, nevertheless, made his estate a vested estate, notwithstanding the grant under which he claims has annexed a further condition which may defeat it.

In short, the statute has made this remainder (although its beneficial enjoyment depends upon the condition that he sur-

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vives his father), a vested remainder liable to be defeated by a condition subsequent.

Such an estate is, in its nature, devisable, descendible and alienable. 1 *R. S.* 725, § 35. This is made a general rule, going much farther, and embracing all expectant estates. In this particular case, the death of the party in whom it is vested, before the termination of the precedent estate, would defeat it, but this does not change its legal character; it is still a vested estate, although death may defeat it. It is, therefore, alienable, subject to that contingency, and the deed of partition was therefore inoperative.

The question remains, could this estate, vested in interest, but liable to be defeated by the death of the person to whom it was limited, be sold under execution?

Our statutes declaring the lien of judgments, and authorizing sales by virtue of execution, apply to "lands, tenements, real estate and chattels real." 2 *R. S.* 359, § 3; 363, § 2; 367, § 24, *et seq.*; 373, § 61, *et seq.*

If the words "lands or real estate" embrace such an estate as that in question, then it was subject to sale on execution, and the defendant acquired title, defeasible as to any share of one-eleventh, by the death of one of the eleven children of John Jackson before his decease, and actually defeated as to the one-eleventh conveyed to Richard Jackson by his sister, Fanny Baldwin, who died before her father.

Concede that a possibility of reverter, as in 4 *Den.* 412, a naked possibility, as in *Edwards v. Varick*, 5 *Id.* 664, or a merely equitable interest, trustees being in possession, holding the legal title, as in *Brewster v. Striker*, 2 *N. Y.* 19; or other purely equitable interest, unaccompanied by possession, as in *Sage v. Cartwright*, 9 *Id.* 49, or a contingent remainder, as in *Striker v. Mott*, 28 *Id.* 82, cannot be sold on execution. This is far short of holding that a vested estate in remainder, only liable to be defeated by a subsequent event, may not be.

The subject of sale here was an estate in the land, a legal estate, vested in interest by the very terms of the statute, and alienable by the owner thereof; this is "*real estate*," and by such name is subject to levy and sale.

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For these reasons, I think the judgment of the supreme court must be reversed.

The appellant appears, by the pleadings, to claim but ten-elevenths of the premises, and seems to concede that the death of Fanny Baldwin defeated her title to one-eleventh of the premises. This is clearly so at law; and it is not claimed that there are any equities arising out of the partition deeds which inure to the benefit of the defendant, to make her purchase effectual as to that one-eleventh.

The judgment should be reversed, and judgment ordered affirming the title of the defendant to ten-elevenths, and of the plaintiff to one-eleventh part of the premises in fee.

A majority of the judges concurred in this opinion.

Judgment reversed, and judgment ordered for defendant for ten-elevenths of the premises, and for the plaintiff for one-eleventh, without costs.

 SHERWOOD v. AMERICAN BIBLE SOCIETY.

December, 1864.

By common law, and in the absence of statutory prohibitions, corporations, in whatever manner created, could take by all the usual methods of acquiring property. By the statute of wills (3 R. S. 57, § 3), they are now prohibited from taking lands by devise, unless expressly authorized by their charters or by statute,* but they may still acquire personal property in any manner.

A foreign corporation is competent to take personalty in this State, by bequest. Although it has no legal existence out of the State of its creation, its existence in that State may be recognized in this State; and its foreign residence creates no insuperable objection to its receiving a gift of money by will from a resident of New York, if it be authorized generally by its charter to take such gifts.†

* A general law, incidentally recognizing the power of certain corporations to take by devise, &c., is not enough to sustain a devise of lands. *Jackson v. Hammond*, 2 Cal. Cas. 337; *Ayres v. Meth. Ep. Ch.*, 8 Sandf. 351; S. C., 8 N. Y. Leg. Obs. 17.

† Compare *Chamberlain v. Chamberlain*, 43 N. Y. 424, 432; *White v. Howard*, 46 N. Y. 144; affirming 53 Barb. 294.

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It seems, that this would be otherwise if our own law forbade domestic corporations to take such donations.

A bequest to a voluntary and unincorporated body of persons—described as the “Arcot Mission,”—*Held*, invalid for want of a capable legatee.*

Gilbert P. Sherwood brought an action in the supreme court against the American Bible Society, the other societies below named, and Mary P. Sherwood, to obtain a construction of the will of Ann P. Sherwood, under which the plaintiff was sole executor, and defendants were legatees. The will, after directing debts, &c., to be paid, provided as follows:

“*Second*. I give and bequeath unto the American Bible Society the sum of two thousand dollars.

“*Third*. I give to the American Tract Society two thousand dollars.

“*Fourth*. I give and bequeath unto the Arcot Mission of the Reformed Dutch Church the sum of three thousand dollars, to be used for the education of the heathen boy on whose account I have heretofore advanced money.

“*Fifth*. I give and bequeath unto the American Colonization Society one thousand dollars.”

“*Sixth*.” A bequest not necessary to mention.

“All the residue I give and devise unto my two children, Gilbert and Mary P. Sherwood, share and share alike.

“I hereby appoint my son Gilbert sole executor.”

The complaint alleged that doubts had arisen whether the bequests to the societies above mentioned were valid; and whether said societies were incorporated, or if incorporated, whether they could, by their acts of incorporation, severally take the bequests mentioned in the will.

The will was dated Dec. 16, 1858, and the testatrix died Dec. 28, 1858.

Mr. Justice GROVER, who tried the cause, found among other things, that the American Bible Society was duly incorporated by a statute of this State, passed March 25, 1841, for the purpose of publishing and promoting a general circulation of the holy scriptures without note or comment; that the

* As to a bequest to a corporation to be formed, compare *Rose v. Rose*, p. 108 of this volume; *Burrill v. Boardman*, 43 N. Y. 254.

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American Tract Society, was, by a statute of this State, passed May 26, 1841, incorporated for the purpose of printing and circulating religious tracts and publications; that the Arcot Mission of the Reformed Dutch Church, was never incorporated, but was a branch of the Board of Missions of the Reformed Protestant Dutch Church, which Board of Missions, at the time of the date of the will and the death of the testatrix, was not incorporated, but was incorporated by a statute of this State passed in 1860; that the American Colonization Society, was, by an act of the general assembly of the State of Maryland, passed on December 26, 1836, incorporated for the purpose of colonizing the free people of color of the United States, and was by said act of incorporation empowered to take lands by devise, and money, goods or chattels by bequest. He accordingly decided that the several legacies to the American Bible Society, American Tract Society, and American Colonization Society were valid, and should be paid by the executor from the estate, with costs to each of the said legatees to be adjusted; that the legacy to the Arcot Mission of the Reformed Dutch Church was invalid, but that no costs should be allowed to plaintiff or to the Arcot Mission as against each other.

From the judgment entered on this decision, plaintiff, and the defendants, Mary P. Sherwood and the Arcot Mission, appealed to the court at general term, where the judgment was affirmed, with costs of the appeal to be paid out of the estate, to the attorneys of all the parties in the action, including the Arcot Mission, whose costs on the appeal were adjusted at one hundred and thirteen dollars and fifty-four cents.

The plaintiff appealed from so much of the judgment as held the three legacies valid, and as gave defendants costs. Mary P. Sherwood appealed generally; and the Arcot Mission appealed from so much as held its legacy invalid, and as omitted to give costs before the appeal to the general term.

Alexander W. Bradford, for the plaintiff, and for Mary P. Sherwood, appellants;—Cited *Owens v. Meth. Miss. Asso.*, 11 *N. Y.* 406, as to the powers of corporations; *Marshall v. Downing*, 23 *N. Y.* 366; *Tucker v. St. Clements' Ch.*, 3 *Sandf.* 242; see also 15 *Johns.* 383, 2 *Cow.* 675; *Ang. & A. on C.* § 161;

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Curtis v. Hutten, 14 *Ves.* 537; *Miller v. Ewell*, 27 *Me.* 509; *Schemerhorn v. Am. Life & Trust Co.*, 7 *Wend.* 279; *Lib. 8 Code, de her inst.*; *People v. Utica Ins. Co.*, 15 *Johns.* 383; *Bank of Augusta v. Earle*, 13 *Pet.* 587; *N. Y. Fireman's Ins. Co. v. Sturgess*, 2 *Cow.* 675. The clauses of the revised statutes generally as to powers of each class of corporations. *Miller v. Ewell*, 27 *Me.* 509; *Story Conf. of L.* § 38; *Pennington v. Townsend*, 7 *Wend.* 279.

Livingston K. Miller, for the Arcot Mission;—Cited *Hornbeck v. Am. Bible Soc.*, 2 *Sandf. Ch.* 133; *Banks v. Phelan*, 4 *Barb. Ch.* 80; *N. Y. Inst. for Blind v. How*, 10 *N. Y.* 84; *Shotwell v. Mott*, 2 *Sandf. Ch.* 46; *Potter v. Chapin*, 6 *Paige*, 629; *Dewitt v. Chandler*, 11 *Abb. Pr.* 459; *Williams v. Williams*, 4 *Seld.* 525; *Goddard v. Pomeroy*, 36 *Barb.* 554. As to costs, *Rogers v. Ross*, 4 *Johns. Ch.* 608; *Smith v. Smith*, 4 *Paige*, 271; *King v. Strong*, 9 *Id.* 94; *Mitchell v. Blain*, 5 *Id.* 588.

S. H. Thayer, for American Bible Society, defendant and respondent.

G. N. Titus, for American Tract Society and American Colonization Society, defendants and respondents.

BY THE COURT.—WRIGHT, J.—It will be convenient to examine, in order, the validity of the bequests; first, to our own corporations; second, to the foreign corporation; and third, to the voluntary association, styled in the will, the “Arcot Mission of the Reformed Dutch Church.”

1. In respect to the bequests to the Bible and Tract Societies: These societies were, in 1841, created by the legislature bodies corporate, and invested with the general and incidental powers and attributes of a corporation aggregate at common law. The purposes for which they were formed were specified; a limitation set upon the amount of income to be derived from property respectively held by them; and it was declared that they should possess the general powers, and be subject to the provisions of the title of the Revised Statutes, “Of the general powers, privileges and liabilities of corporations.” *L. 1841, 266, c. 68*; 1 *R. S.* 599. The powers enumerated in the general

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statute referred to, were those which at common law pertained to corporations aggregate, and the statute was but declaratory of the common law in respect to the rights of such corporations. The right to take and grant property, was and is of the essence of every corporation, whether created by license, or prescription, or legislative act, and in the absence of any statutory prohibition, they may take by all the usual modes of acquiring property. They always had the right at common law to take personal property *by bequest* (*Ang. & A. on Corp.* p. 111, § 6; *Matter of Howe*, 1 *Paige*, 214; *McCartee v. Orphan Asylum*, 9 *Cow.* 437; *Williams v. Williams*, 8 *N. Y.* 525, 530; *McDonough v. Murdock*, 15 *How. U. S.* 367; *Attorney-General v. Ruper*, 2 *P. Wms.* 125; *Grant on Corp.* 116, 117); and I entertain no doubt that they have that right under our statutes. In the statute enumeration of the general powers of all corporations is that of *holding*, purchasing and conveying such real and personal estate as the purposes of the corporation may require, with the power to *hold* and *purchase* property. All other powers necessary to its exercise are given. 1 *R. S.* 599, §§ 1, 3. This includes the power of taking by all the usual modes of acquiring property not forbidden to corporations by the statute. The statute of wills prohibits them from taking lands by *devise* unless expressly authorized by their charters, or by statute (2 *R. S.* 57, § 3), but there is no statute imposing any prohibition in respect to the manner of their acquiring personal property. The same legislature which enacted the statute concerning corporations, enacted the prohibition in the statute of wills; but unless the power to take lands by devise was embraced in the statutory grant of powers to corporations, the enactment of the prohibition was unnecessary. It was, I think, embraced, hence the necessity of the prohibition; and the inference is irresistible that the same grant of power vested in corporations the capacity of taking a pecuniary gift by will.

It is urged that the statute has restricted corporations to the acquisition of personal property by *purchase* in the ordinary acceptance of the term; but the interpretation has been repudiated by this court. In *Downing v. Marshall*, 23 *N. Y.* 366, it was held that the two corporations, the capacities of which

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we are now considering, were free to take money or personal property by testamentary gift, though it was to be raised by a conversion of real estate. The gifts, therefore, to the American Bible Society and the American Tract Society, were not invalid for want of power or capacity, as corporations, to take them, and this is the only ground urged against their validity.

2. As to the bequest to the American Colonization Society: This is a foreign corporation, created for the purpose of colonizing the free people of color of the United States, and was expressly empowered by its charter to take money, goods and chattels by bequest. The objection, therefore, of want of capacity to receive a testamentary gift has no application. But it is said that corporations are artificial beings, created by the sovereign authority, and can have no existence, nor exercise any of their powers beyond the jurisdiction of the sovereignty which creates them. It is true that the corporation in question can have no legal existence outside of the State of Maryland, but its existence there may be recognized in this State; and its residence in Maryland creates no insuperable objection to its receiving a gift of money by will from a resident of New York, it being authorized generally by its charter to take such gifts. Of course, the exercise of this power depends for its validity upon our laws, and upon the sanction, express or implied, of the State; and so does the exercise, within our jurisdiction, of all other powers of corporations of another sovereignty. By comity we recognize the existence of a corporation in another State, and permit it to exercise the powers with which it is endowed, in our own, unless such exercise is repugnant to our policy, or injurious to our interests. It is not more contrary to State policy to allow an artificial than a natural person of another State to take a testamentary gift of money from a donor residing here. This would undoubtedly be otherwise if our own corporations were without the faculty of taking such donations; for a prohibition upon the latter would be a plain indication of State policy on the subject. But as has been seen, our corporations are free to take personal property by bequest. The gift, therefore, to the American Colonization Society was not invalid.

3. The remaining bequest, the validity of which is ques-

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tioned, is, in the words of the will, to "the Arcot Mission of the Reformed Dutch Church, to be used for the education of the heathen boy on whose account I have heretofore advanced money." The Arcot Mission was a voluntary association of male and female missionaries, located in southern Asia. This body of missionaries had its own officers, a secretary and treasurer, and was, at the death of the testator in 1858, associated with, or under the control of the board of foreign missions of the Reformed Dutch Church, a body which was not incorporated until 1860. The object of the mission was "to preach, and teach both children and adults, and generally to disseminate Christianity among the people in the region where it was located." Its functions were exercised at large, and not with reference to specific individuals. It cannot be implied from the expression "to be used for the education of the heathen boy on whose account I have heretofore advanced money," that some particular person was intended by the testatrix. In connection with the proofs, it is obvious that this and previous contributions were general—for our heathen boy—a form not unusual with a continuous charity when no particular recipient is within the view of the donor. Indeed, if it was a trust credited for the use of a particular person, a single individual; it would not be a "charity" in a legal sense; for to constitute a charity the use must be public in its nature. *Omaney v. Butcher*, 1 *Turn. & R.* 260. But whether the use be a charitable or private one, it is invalid, for the reason that there is no trustee competent to take the fund so as to secure its appropriation to the purpose intended. Where there is no trustee appointed having legal capacity to take and hold a gift, the legal estate can never vest and of course no use can be raised. There can be no valid trust, unless it be so constituted that a title can vest in some person natural or artificial by force of the gift itself. *Downing v. Marshall*, 23 *N. Y.* 366, 382. As was truly said, in *Owens v. Missionary Soc.*, 14 *Id.* 380, 406, "to constitute a valid use there must be in all cases, first, a trustee legally competent to take and hold the property; and, secondly, a use for some purpose clearly defined." If there be no such trustee in the first instance, the attempted disposition fails. In fact there is no trust, and a

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court of chancery acquires no jurisdiction of the case. It cannot be pretended that the "Arcot Mission," a voluntary and fluctuating body of persons, unknown to the law and irresponsible to the courts, was legally capable of taking the legacy under the will of the testatrix. Indeed the Board of Foreign Missions of the Reformed Dutch Church, under whose auspices the missionary labor at Arcot was conducted, was, at the death of the testatrix, itself incapable of receiving the gift; not having been incorporated for more than a year thereafter.

It may be deemed settled in this State that a voluntary, unincorporated association has not legal capacity to receive a donation, even for a purpose denominated "charitable." In *Owens v. Missionary Soc.*, 14 *N. Y.* 380, the question was whether a bequest to such an association, for a "charitable" purpose was valid. It was held that it was not, on account of its want of capacity to take the fund and effectuate the charity. So, also, a similar conclusion was reached in *Downing v. Marshall*, 23 *N. Y.* 366. There the bequest was to an unincorporated body of persons, known as the Home Missionary Society. The purpose of the trust was religious or charitable. The fund was to be devoted to the same object as in the present case, viz: Christian missionary labor. The bequest was held void for want of a competent trustee.

These conclusions upon the disputed matters in the will accord with those of the supreme court, and lead to an affirmance of its judgment in the suits.

I am in favor of such affirmance, with costs of appeal to the three incorporated societies, to be paid by the executor from the assets of the estate; but without costs of the appeal to the Arcot Mission. Indeed, so much of the judgment of the general term as gave costs of appeal to the Arcot Mission should be reversed.

All the judges concurred.

Judgment affirmed, except as to costs allowed to Arcot Mission, and as to those reversed. Costs of the appeal, to the other societies, respondents, to be paid out of the estate.

Shoop v. Clark.

SHOOP v. CLARK.

September, 1864.

The question of usury is one of intention; and where a note is discounted for an amount which *prima facie* would indicate the taking of usury, this presumption may be rebutted by showing that it was agreed between the parties that no more than legal interest should be collected on the note.*

In suing on such a note, it is not a material variance to plead the note in the usual form adopted where the whole amount is sought to be recovered, and then to prove the special character of the discount, to repel the defense of usury.

Charles Sheop sued James, Joseph L. and Nathan Chappell, in the supreme court, on a promissory note. Pending the suit defendant James Chappell died, and George R. Clark and Martin S. Newton, his executors, were substituted in his place. The note was for two hundred and sixty-five dollars, payable two months from date, made by Joseph L. Chappell, and indorsed by James Chappell for the accommodation of their brother Nathan Chappell, who had indorsed it to James and Amos Ray, from whom it passed to the plaintiff.

The making and protest of the note were proved, and the defendants admitted due notice to the indorsers; and then, to avoid the note, proved that the Rays had given only two hundred and fifty dollars for it, and as fifteen dollars, the difference between that sum and the face of the note, was more than the interest on two hundred and fifty dollars for two months, they claimed that the note was void for usury.

To rebut this, the plaintiff was allowed to give evidence to show that the Rays had advanced the money to Nathan Chappell under the agreement that it was simply to be a voucher for two hundred and fifty dollars, to be used in making payments on a mortgage due from them to James Chappell, one of the indorsers on the note, and that the Rays never expected to recover more than two hundred and fifty dollars on the note. To this evidence the defendants objected on the ground

* Compare Bracket v. Barney, 28 N. Y. 333.

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that it was a material variance from the complaint, in which the whole amount of the note was demanded.

The judge overruled the objection, and submitted the question to the jury as to whether or not there had been an agreement to take usury. To the admission of the evidence, and the submission of the question of usury to the jury, the defendant excepted. Judgment was given for plaintiff on a verdict for two hundred and fifty dollars.

The supreme court, before whom, on appeal from the judgment, the main objection urged was that of variance, held that it was not necessary for plaintiff to plead the facts relating to the discount (citing *Douglass v. Wilkeson*, 6 *Wend.* 637; 17 *Id.* 431); and that there was no error in admission of evidence.

Defendants appealed.

George F. Danforth, for defendants, appellants;—Cited 5 *Seld.* 572; 6 *Bosw.* 328; *Bull. N. P.* 298; 1 *Gale & D.* 237; 6 *Jurist*, 389; *White v. Stillman*, 25 *N. Y.* 542; *Douglass v. Wilkeson*, 6 *Wend.* 637; *Sackett v. Spencer*, 29 *Barb.* 186; *Andrews v. Chadbourn*, 19 *Id.* 147; *Bristol v. R. R.*, 9 *Id.* 158; *Field v. Mayor, &c.*, 6 *N. Y.* (2 *Seld.*) 117; *Livingston v. Tanner*, 13 *Barb.* 481; *Mann v. Morewood*, 5 *Sandf.* 557; *Kelsey v. Western*, 2 *N. Y.* 500; *Catlin v. Harsen*, 1 *Duer*, 309; *Fagan v. Davison*, 2 *Id.* 143, 158; *Texier v. Gouin*, 5 *Id.* 389; *Moore v. McKibben*, 33 *Barb.* 246; *Wood v. Whiting*, 21 *Id.* 198; *Swift v. Kingsley*, 24 *Id.* 543; *Steamer v. Tapple*, 5 *Duer*, 303.

John C. Strong, for plaintiff, respondent.

DENIO, Ch. J.—It is essential to the defense of usury that there should have been a corrupt agreement between the parties to the loan, that the lender should have secured to him a greater rate of interest than that allowed by the statute. It is not of course necessary that such an agreement should be expressed in terms. If such is the effect of the transaction into which the parties enter, it is a usurious contract. If *N. L. Chappell*, in the case before us, had negotiated the note, on

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which the action is brought, to the Rays for an amount less than its amount with legal interest, without anything to qualify the transaction, the difference between the money payable by its terms, and the sum advanced by the purchaser, would have been a usurious premium, because there would have been nothing else to which the excess could have been referred. But if Chappell, having the note in his possession, with authority to negotiate it in a lawful way, had negotiated for a sum less than its amount, taking from the lenders an explicit agreement that they were not to hold it or claim, or collect, by means of it, a larger amount than that which they had advanced with lawful interest, there would have been no usury in the transaction, for the reason that there would have been no corrupt agreement. It is quite usual for notes and mortgages to be drawn, dated and executed preparatory to a loan, and providing for the payment of interest from their date, and afterward made operative, by delivery and the advancing of the amount of the principal sum mentioned in them. In such cases an amount would, *prima facie*, be secured to the lender greater than the sum loaned and the legal interest, and the securities would be liable to the charge of usury; but if it could be shown that such was not the intention, but, on the contrary, that it had been expressly agreed between the parties, that interest should be payable only from the time the money was advanced, the defense of usury would be repelled. It very frequently happens that notes and bills prepared for the purpose of being discounted, are made for a larger amount than the bank or other party which is expected to be the lender is willing to advance. If, in such case, it be agreed that only a part of the amount should be lent and that the paper should be negotiated for the security of that amount only, the transaction is not usurious. The convenience and safety of the parties would no doubt be promoted by a written statement annexed to the paper setting forth the actual state of the facts; and this is understood to be a very usual method in such cases. But whether the evidence exists in such an authentic form, or is otherwise satisfactorily established, it is equally effectual to rebut the allegation of usury. In whichever way the fact is established, when satisfactorily shown, it equally disproves the

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existence of a corrupt agreement between the lender and the borrower. It is surely unnecessary to refer to authorities to establish so plain a proposition. Several such are recited in the case of *Condit v. Baldwin*, 21 N. Y. 219; and the principle is asserted or conceded both in the principal and dissenting opinions. The doctrine of the necessity of an actual corrupt agreement in order to predicate the vice of usury was there carried to an extent to which all the judges could not agree. But the general proposition that usury could be repelled by showing the absence of such a contract met the assent of all the members of the court.

I do not understand the counsel for the defendant to maintain the opposite of what has thus far been stated. His position is that if a note could be negotiated for a less amount than the sum stated in it, the arrangement would be a substituted agreement, and would require to be stated specially in the complaint. The complaint in this case takes no notice of the circumstance that the paper was held for less than the amount expressed in it, but is in the usual form adopted when the whole amount is sought to be recovered; and hence it is argued that the plaintiff ought not to have been permitted to answer the allegation of usury by proof of the special circumstances of the case; that in the absence of such proof the evidence of usury would be complete; and that upon such evidence being given, the plaintiff's case was fatally variant from the one stated in the complaint. These objections are not in my opinion sound, though it may be admitted that they are specious. The note on its face contains no feature of which usury could be predicated. That was attempted to be made out by the parol evidence. There is nothing respecting interest, whether lawful or excessive, in it. The defendants made out by parol a *prima facie* case of usury; but this was subject to be met and disproved by the same species of evidence. As to the alleged variance, I do not think the case could have presented any difficulty under the former more strict system of pleading. The contract set up in the complaint, and the one established by the evidence, are identical. It is a promissory note, having a certain person as maker and certain others as indorsers, which was counted upon and which was proved by

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the evidence. Simply there was a circumstance brought out on the trial which showed that the plaintiff was not entitled to recover the whole sum of two hundred and sixty-five dollars, but only two hundred and fifty dollars and the interest. Except on the question of usury, it would have been for the interest of the defendants, and it would have been their right, to have themselves proved that circumstance, to reduce the recovery. It would not have established that the plaintiff was not the holder of the note, but only that he held it under such circumstances that he could not recover the whole amount, but only so much as had been advanced when the note was first negotiated. But the defense of usury being set up, and supported by *prima facie* evidence, it became the interest of the plaintiff to show the peculiarity in the case, namely, the partial want of the consideration advanced upon its negotiation, in order to repel the assumption of usury. When this was once shown, it had the double effect of establishing that there was no usury in the contract, and that the note could not be lawfully enforced for an amount beyond that which was advanced, and the interest. The giving of that evidence did not have the effect to substitute a parol contract for the written one contained in the note, but to establish a partial defense to the written contract.

The case of *Douglass v. Wilkeson*, 6 *Wend.* 637, on which some reliance is placed, cannot aid the defendants. The payee of a note for two thousand five hundred dollars indorsed on the back of it over his signature these words, "Mr. Olcott, pay on within seven hundred and fifty dollars," and obtained that amount of money from the bank of which Mr. Olcott was the cashier. The plaintiff appears to have been indorsee of the bank. The question was whether the writing was a legal indorsement and transfer of the note, and it was held that it was not. This was partly on the ground that an entire contract could not be divided. It was shown, moreover, by authority, that a bill could not be indorsed for a part only of its contents, *unless the residue had been extinguished*. The indorsement in the case before us was in the usual blank form, and did not purport to divide or split up the note, and transferred the whole note. The balance of the note beyond the

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amount advanced by the Rays was effectually extinguished. The general indorsement transferring, as it did, the whole contract, there was nothing remaining in the payee.

The case of *Douglass v. Wilkeson* came up again after the declaration had been amended by setting out the note as one made for seven hundred and fifty dollars, and indorsed by the defendant, the payee, to the plaintiff. The facts were that the defendant, who indorsed for accommodation, had declined to indorse for the whole twenty-five hundred dollars, and therefore indorsed specially as has been mentioned and it was discounted for the seven hundred and fifty dollars. The plaintiff was permitted to recover that amount upon that state of facts, and the recovery was sustained by the supreme court and the court for the correction of errors. 17 *Wend.* 431; 22 *Id.* 559. A remark of Mr. Justice BRONSON, in the course of the opinion of the supreme court, recognizes very distinctly the correctness of the view which I have taken of the present case. He says: "It is not unusual, I believe, to discount accommodation paper for a less sum than the nominal amount; and I am not aware that the right of a holder to treat it as a valid security against all the parties for the amount at which it was discounted, has ever been questioned. I do not speak of a usurious discount, but of a transaction like the present one, where the note was received by the bank in the same manner as though it had been drawn for seven hundred and fifty dollars, and nothing more than the legal discount was charged upon that sum."

The testimony of James Ray, though it was to some extent disputed by N. L. Chappell, was sufficient to take the case to the jury. He said positively that the understanding was not that the Rays were to hold the note for the whole amount, so as to realize the fifteen dollars difference, but only for the amount which he and the other Ray advanced.

I am satisfied that the supreme court was right, and that the appeal was without substantial merits, and am for affirming the judgment appealed from.

HOGEBOM, J. [After stating the facts.]—I think the charge was correct, and was unexceptionable in point of law. There were also sufficient facts in the testimony of James Ray to

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justify its being submitted to the jury in that aspect of the case.

The defendant, it is true, objected that the note was for a *larger amount*, and that the plaintiff claimed to recover the whole, but that is not precisely the objection of variance. If it was, the judge would have had a right, I think, to conform the pleadings to the facts proved, to disregard the variance, and to treat the pleadings as amended. That was a matter of discretion, and if he had in terms exercised such a power, I think its correction would have been beyond our reach.

It was still a note for two hundred and sixty-five dollars on its face, which Ray discounted, and it remained so, though the whole amount was not discounted upon it. It was *that note* which Ray discounted. When he received it there was not so much due upon it, and he discounted it for the lesser sum. The plaintiff erred in the amount he claimed to be due, but that is not material.

The judgment should be affirmed.

All the judges present concurred.

Judgment affirmed, with costs.

SIMMONS v. LAW.

December, 1866.

Affirming 8 Bosw. 213.

Under a bill of lading for the carriage of goods from San Francisco to New York, to be shipped from San Francisco to Panama, forwarded across the isthmus and reshipped thence to New York, the carrier, if admitted to have been a carrier between the termini, is chargeable as such for a loss upon the isthmus.

If by the fair construction of the bill of lading he would be thus liable, evidence is not admissible, that there was a custom of shippers, known to the owner, to insure on the isthmus, and of carriers to refuse to be liable as such on the isthmus.

A clear, certain and distinct contract is not liable to modification by proof of custom.

George A. Simmons sued George Law, in the New York superior court to recover the the value of a quantity of gold-

dust shipped by the defendant's line of steamers, from San Francisco to New York, on March 14, 1851. Defendant was a common carrier between those places, and received the gold-dust in that capacity. This was alleged and admitted in the pleadings, and was proved on the trial. The package never reached New York, and plaintiff after demand, sued for its value.

A bill of lading was given by defendant's agent at San Francisco, giving the marks and numbers upon the package, its alleged value, and in the margin, expressing a portion of the contract as follows :

"Freight through to New York $1\frac{1}{2}$ per cent, \$50.29, and five per cent primage, \$2.51—(total) paid, \$52.80. Received payment, through to New York, O. Charlick, per Crane."

The body of the bill of lading contained the same general contract, its language declaring that the package was shipped on the Antelope, for Panama, thence to be forwarded across the isthmus, and to be reshipped by steamer of a specified company; and with the following qualification of the ordinary contract of carriage, upon which the questions presented in this case arose. It was in these words: The property is . . . "to be delivered in like good order and condition at the port of New York, dangers of the seas (land carriage and river navigation, thieves and robbers) excepted, unto George A. Simmons, or," &c.

At the trial defendant requested the judge to instruct the jury that as to the passage of the isthmus, he was a mere forwarder, and actual negligence must therefore be proved. This the judge refused. The instructions he gave are stated in the opinion.

The superior court, at general term, on appeal from a judgment on a verdict for plaintiff, held there was no foundation in the contract for the request, and that proof of a usage to the same effect was inadmissible.

John N. Ashmead, for defendant, appellant.

William Bliss, for plaintiff, respondent.

BY THE COURT.—HUNT, J. [After stating facts.]—On the

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trial the judge charged the jury, that the defendant agreed to deliver the gold-dust, unless he was prevented by some one of the perils or causes specified in the bill of lading; that among those were dangers of the seas, land carriage, river navigation, thieves and robbers; that, the dust not having been received, it was incumbent on the defendant to show by satisfactory evidence that some one of these causes prevented the delivery. The judge further stated that there was no pretense that the property was lost by dangers of the seas or by robbers; there was no pretense that the persons in charge were attacked by any person, or that it was taken from them by violence, and that the question of fact submitted to them by the counsel for the defendant was, that it was really stolen, lost by thieves. The learned judge charged the jury that if the property was lost by means of any of the perils excepted from the risk, the defendant was not liable. This gave the defendant the full benefit of the construction of the clause in question, as claimed by him. The judge submitted to the jury the question whether the money, if stolen, was stolen by persons in the employment of the defendant or the company, their servants, agents or employees, or whether it was stolen by persons not in the employment of or connected with the service of the company; that in the former event the defendant would be liable, and in the latter event he would not be liable. No exception was taken to this ruling of the law, or any part of it. It is now expressly conceded on the points of the defendant's counsel, that if the missing treasure was stolen by the servants of the carrier, the carrier would be responsible for the loss, notwithstanding the exemptions of the contract. 1 *Story on Bailm.* § 528. No question, therefore, arises upon the construction of the contract in its general aspect; or upon the charge to the jury.

The defendant's counsel claims error in the rejection of certain proof offered by him as follows: "That it was the custom of shippers of treasure to insure it against risks upon the isthmus; that there was a custom in reference to the transportation across the isthmus in 1851 and previous thereto, by which the carrier of gold from San Francisco to New York refused to assume any risk on the isthmus, and that the bills of lading then in use excepted all risks of land and river car-

riage on the Isthmus; that the bill of lading in evidence was entered into with this understanding for the purpose of explaining any ambiguity in the language of the bill of lading, and that these customs were known to the shippers in the present instance." The evidence was rejected.

The contract in question was clear and distinct, free from all ambiguity, open to no doubt whatever. On the clause of exemptions from perils, the court ruled the construction as matter of law, and ruled it in conformity with the defendant's views. There was, therefore, no room for proof of custom. A clear, certain and distinct contract is not subject to modification by proof of custom. Such a contract disposes of all customs and practices by its own terms, and by its terms alone is the conduct of the parties to be regulated and their liability to be determined. *The Reeside*, 2 *Sumn.* 567; *Wadsworth v. Alcott*, 6 *N. Y.* 64; *Westcott v. Thompson*, 18 *N. Y.* 363, 367; *Arg. on Com. Car.* § 229. There was no error therefore in the rejection of the evidence thus offered.

The defendant's counsel also requested the court to charge the jury "that the true construction of the bill of lading is, that the transportation on the isthmus by road and river navigation, was to be at the risk of the plaintiff, and that so far as the isthmus was concerned, the defendant was a bailee for hire and not a common carrier, and that the plaintiff cannot recover unless he proves that his loss was by the negligence of the defendant or his agents." This charge the judge declined to give. As I have stated, it was expressly alleged in the complaint that the defendant received the goods in his capacity of common carrier, upon a contract to transport them to New York, and that this allegation, by not being denied in the answer, was admitted by the defendant. The bill of lading introduced in evidence also contained an express contract, both in the margin and in its body, to carry the goods the whole distance. The contract is single and applies to all parts of the route, as the payment of freight was the compensation for the entire transportation. In the event of losses from certain causes specified, the defendant was not to be liable, while upon the happening of a loss from any other cause, he was bound to make good the loss. The exceptions specified do not apply

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exclusively to the isthmus. The exception of dangers of the seas extended over the whole route; that of river navigation might, for aught we know, apply to short carriages at San Francisco or New York, that of thieves or robbers would relieve from the liability for the acts of these marauders wherever they might occur, and during any part of the voyage, upon either ocean, as well as upon the isthmus. It would have been in manifest violation of the terms of the contract to have given the direction asked for by the defendant's counsel. By the nature of the contract, the defendant was a common carrier, and responsible for the entire transportation. *Sweet v. Barney*, 23 *N. Y.* 337. It does not affect this position that the contract contained special provisions. So far as it was special the common law liability was qualified; in all other respects it remained. In any contract of transportation there are certain qualifications of the carrier's liability, which exist whether expressly mentioned or left unnoticed. The law provides that if the loss occurs from the set of God or the public enemies, the carrier is not liable. Neither these exceptions nor other more extended ones destroy the general effect of the contract of the carrier. They simply limit or qualify it. His general liability exists, and if the loss arises from any cause, excepted either by the rules of law or the qualifications of the contract, he is so far relieved from liability, but no farther. *Clark v. Rochester & Syracuse Railroad Co.*, 14 *N. Y.* 570; *Merritt v. Earle*, 29 *N. Y.* 115; *Palmer v. Grand Junction R. R. Co.*, 4 *Mees. & W.* 749; *Story on Bailm.* § 557; *Ang. on Com. Car.* § 220; *Reed v. Spaulding*, 30 *N. Y.* 630; *Dorr v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 485. There is therefore no basis for the claim, that upon the isthmus the defendant was a bailee for hire simply. Then, as in the other parts of the transportation, he was a common carrier, and subject to the liabilities of that character, except so far as they were modified by the terms of the contract in which the transportation was undertaken.

[Remarks on immaterial questions are omitted.]

All the judges concurred.

Judgment affirmed, with costs.

SIMMONS v. SINES.

December, 1868.

An order of commissioners of highways signed by only two, and not reciting a meeting, &c., of three, or notice to a third, is void unless it affirmatively appears that the town had only two commissioners. It cannot be presumed that there was not a third.

The rule that a grantee of land is entitled to a way of necessity over the land of his grantor is applicable, where instead of a formal transfer there is an equitable grant of the title with the right of possession.

David Simmons sued Jane Sines in the supreme court for trespass to lands.

The plaintiff was the owner of two lots, one of fifty acres and the other of fifty-five acres, adjoining each other. To one of them he obtained title in 1858, and to the other in 1861. Defendant owned a lot in the rear of the plaintiff's land, and from it a road runs through the plaintiff's two lots to the highway, and this road was the only means of access which defendant had to the public highway. It was opened and used as early as 1846 or 1847. An attempt was once made to have this road regularly laid out as a highway, but it failed through informality in the proceedings of the commissioners. Gould was the original owner of the three lots now owned by the parties to this suit.

The defendant was in possession of his lot at the time of the commencement of this suit, and had been for several years previously; it was purchased in 1846 of Gould, who was also the grantor to the plaintiff of the fifty-five acre lot through which the road in question runs; the plaintiff was at one time in possession of the defendant's lot, claiming to own it, and he transferred it to one Galusha, under whom the defendant claims title.

The referee found, as a conclusion of law, that defendant had a right of way over the land of plaintiff from necessity.

The testimony relating to the plaintiff's ownership and sale of defendant's lot, was given by the plaintiff. He testified, after giving an account of previous occupants of defendant's

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lot, that Galusha succeeded Burton in possession. That he bought it of Galusha and kept it a year, and that Galusha bought it back and came on to it again. Upon being recalled he further testified that he bought the place of Galusha, and gave him his note for the amount going to him, and that Galusha handed him the contract. That he had it about a year and then gave back the contract to Galusha, and he gave up his note to him. That the contract was not assigned to him, nor did he give any writing when he handed it back to Galusha.

The plaintiff insisted that as Gould conveyed the lot over which the right of way was claimed, without reserving such right of way in respect of the rear lot which he retained, no such right of way was created (relying on *Burr v. Mills*, 21 *Wend.* 290), and insisted that plaintiff never was "a grantor" within the rule.

The supreme court held, on grounds similar to those of the following opinions, that he was a grantor within the rule.

Plaintiff appealed.

BACON, J.—[After stating the findings of the referee.]—This conclusion is fully sustained by the authorities, "ancient, constant and modern," and is as old as *Siderfin* and as recent as *Barbour*. The principle is thus stated in *Buckley v. Coles*, 5 *Taunt.* 311: "If a person own close A., and a passage of necessity to it over close B., and he purchases close B., and thereby unites in himself the title to both closes, yet, if he afterward sell close B. to one person without any reservation, and then close A. to another person, the purchaser of close A. has a right of way over close B."

The principle which sustains a way of necessity was invoked and applied in the case of *Smiles v. Hastings*, 24 *Barb.* 44,* in which it was held, that such a right of way over several lots was a servitude to which each lot was equally subject, and was of the same character and force as if executed by express grant; that in case either of the lots was so situated that

* Affirmed as *Smyles v. Hastings*, 22 *N. Y.* 217.

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there was no access to it by any public road or by any other means, without passing over the lands of other persons, a right of way passed to the grantee as a way of necessity, and such right, being appurtenant to the lands, would pass to persons deriving title from the original grantee. In this case it is not only not controverted but is expressly found, that the defendant had no way of egress from his land to the public highway other than his right of way over the premises of the plaintiff.

[Remarks on an immaterial exception are omitted.]

The judgment should be affirmed.

GROVER, J.—The order laying out the road was signed by only two commissioners, and failed to show upon its face that all met and deliberated upon the subject matter, or were notified to attend a meeting for that purpose, and failed to attend pursuant to the notice. It was therefore invalid. 1 *R. S.* 525, § 125; *Fitch v. Commissioners of Kirkland*, 22 *Wend.* 132. The counsel for the respondent insists that it is notwithstanding valid, for the reason that it did not appear that there were at the time more than two commissioners of highways in the town. The answer to this is, that the presumption is that when a town has two commissioners, it has the entire number authorized by statute [*i. e.*, three], and that the party alleging that there were less must prove such allegation.

The counsel for the respondent also claims that inasmuch as Gould owned the land now owned by defendant, at the time he sold the land now owned by the plaintiff, and there being no mode of getting on to the land now owned by the defendant except by passing over the land of the plaintiff, Gould had the right of way over the lands of the latter to the lands of the former by necessity, and that this right passed by his conveyance and has now become vested in the defendant. Gould, in conveying the lands of the plaintiff, made no reservation of a right of way or of any other kind in the deed. By that he made an absolute grant of the land. No interest therein was retained by him for any purpose. He had no more right to use the land for the purpose of a way than for any other purpose. *Burr v. Mills*, 21 *Wend.* 290.

The referee found, that while the plaintiff was the owner of

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the lands now belonging to him, he was at one time in possession of the lot of the defendant, claiming to own it, and transferred the same to one Galusha, under whom the defendant claims title. That there was no other means of going from the defendant's premises to the public highway, or of returning to the same, except across said plaintiff's premises, and that she used the way from necessity. This finding shows, in substance, that the plaintiff was at one time the owner of all the lands now owned by both parties. That he conveyed the lot of the defendant, there being no access to the lands conveyed except by passing over the lands retained by the grantor. This gave a right of way over the plaintiff's land to that of defendant. *Holmes v. Seely*, 19 *Wend.* 507, and cases cited.

This determines the case in favor of the defendant; but there was an exception taken by the plaintiff to the finding of these facts by the referee. This renders it necessary to look into the case to ascertain whether there was any evidence sustaining the finding.

[The learned judge here recited the testimony above stated and continued.] What interest in the land was given by this contract does not appear. The probability is that it was a contract given by the owner of the land for the sale and conveyance by him to the purchaser upon payment by the latter of the purchase money, as specified in the contract, and giving to the purchaser the right of possession until default made in the payments as required by the contract, as possession was held under the contract. The evidence warranted this conclusion. The contract gave the purchaser and his assigns an equitable title to the land. It is insisted by the counsel for the plaintiff, that this contract related to an interest in real estate, and could, by the statute of frauds, be transferred only by an instrument in writing. In this the counsel is correct, but the evidence shows that the plaintiff took possession of the land and occupied and improved the same for a year; and that he gave his note for the purchase price of the contract. The agreement would have been enforced in equity. The plaintiff thus became the owner in equity of the land, he sold this equitable title to Galusha by a contract binding in equity. The defend-

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ant holds under this equitable title thus sold by the plaintiff, and may have since acquired the legal title.

The legal question then comes to this, whether one who having an equitable title to land, coupled with a legal right of possession, to which there is no access except over his other lands, transfers his equitable title and right of possession to another, thereby gives a right of way thereto over his other land to the purchaser. The same reason is applicable to this case as applies to a transfer of a legal title. That reason is, that when one grants lands, he is presumed to grant therewith that without which the land cannot be enjoyed. In the present case, the plaintiff, having transferred an equitable title to this land, is presumed to have transferred therewith an equitable right of way to and from such lands, without which there can be no beneficial enjoyment of the land. The only trespass alleged was the use of the way by the defendant. This use was lawful, and the plaintiff could not recover therefor.

The judgment appealed from must be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

SLOANE v. VAN WYCK.

March, 1868.

Reversing 36 Barb. 335; and affirming 47 Id. 634.

When the maker of an article takes it back after delivery, because it remains unpaid for, the presumption is that the sale is rescinded, unless there is some evidence to show an intent to take it for the purpose of resale on the buyer's account, or otherwise not to discharge the debt due for the price.

If the evidence is conflicting, it is a question for the jury.

William B. Sloane and one Schwartz sued Pierre C. Van Wyck, T. M. Hall and R. Green, in the supreme court, for work, labor and materials in making a planing machine. The machine was ordered in the first instance by Hall and Green.

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They subsequently sold the patent and the business to which it related, to Van Wyck. Upon this sale being made, the three defendants called on the plaintiffs, and informed them thereof, and Van Wyck subsequently received the machine when completed.

The machine not being paid for, the plaintiffs took it down and removed it; and then sued all the parties, charging them jointly, and offering to deliver the machine on being paid.

The supreme court, after the first trial, held that if Van Wyck was liable at all, it must be because he impliedly or expressly directed the plaintiffs to complete it, and in that case he was substituted for the original debtors, upon the machine being delivered and charged to him alone. As to the retaking of the machine; that if the plaintiffs intended to take it as a substitute for the debt, and relieve defendant from all liability, then they could not now recover for it; but if they merely took it for the purpose of making a sale of it on account of Van Wyck, then they were not prevented from recovering. This question was left to the jury. Reported in 36 *Barb.* 335.

Defendant appealed.

THIS COURT held (in an opinion by WRIGHT, J.) that as there was no evidence that plaintiffs took back the machine for the purpose of making a resale, the legal conclusion was that the sale was rescinded, and, therefore, plaintiffs could not recover. A new trial was accordingly ordered.

On the second trial, it was testified that Van Wyck told one of the plaintiffs that the owner of the premises where defendants had the machine, claimed a lien on it; and that plaintiffs had better take it away, else it would be sold. This was contradicted. The question of intent in the retaking was again left to the jury, and plaintiffs again had a verdict.

The supreme court affirmed the judgment thereon, on the same grounds taken by this court in the following opinion. Reported in 47 *Barb.* 634. Defendant appealed.

The question in this court was whether there was evidence

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to go to the jury, on the question of a resale, sufficient to control the legal effect of the taking back the property as determined by this court, when the cause was previously before it.

C. N. Black, for defendants, appellants.

M. L. Townsend, for plaintiffs, respondents.

BY THE COURT.—CLERKE, J.—The only question in this case is, was there conflicting evidence to go to the jury on the point alleging that the plaintiffs took back the machine in discharge of the indebtedness of Van Wyck, incurred in the purchase of it. This court decided, when the case was last here, that there was no conflicting evidence on this point; that from the plaintiffs' own evidence, it was clear that they took back the machine in discharge of that indebtedness.

Schwartz testifies that Van Wyck told him that Wood, the owner of the premises occupied by the defendant, claimed to have a lien upon the machine; that it would be sold for rent, and that the plaintiffs had better take it away. Van Wyck told him to sell it. This would not be sufficient to exonerate the defendant from liability for a deficiency on the sale, if there should be a deficiency. But the defendant testifies that he never directed Schwartz to sell it. There was a conflict on what I consider an essential point. For, if the plaintiffs resumed possession of the machine without any such direction from the defendant, and without any qualification, the legal conclusion would be, as Judge WRIGHT mentioned in his opinion—to wit, that the sale was rescinded.

Van Wyck testifies that when he spoke to Schwartz about taking the machine away, he told him he must not trouble him (Van Wyck) any further about it, and that Schwartz said he would be satisfied to do so. Sloan, the other plaintiff, who was present on the occasion referred to, swears that Van Wyck did not say that they were not to trouble him again. Schwartz corroborated Sloan. I think in all this there was a plain conflict of evidence on an essential point—the release of the defendant's liability by the redelivery of the machine to the plaintiffs. Was this redelivery for the purpose of satisfying

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the debt due to the plaintiffs, or was it merely for the purpose of selling it on account, and applying the proceeds to its payment? This was fairly put to the jury.

I have assumed throughout that the defendant was liable as purchaser of the machine, and that his substitution in the place of Hall & Green was tantamount to an original promise. This point is disposed of in Judge WRIGHT's opinion. This court reversed the judgment, and ordered a new trial, solely on the ground that there was not a particle of evidence to show that the machine was taken by the plaintiffs, on the order of the defendant, to enable them to sell it, and apply the fruits of the sale toward the discharge of the debt.

The judgment should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs.

SMART v. BEMENT.

December, 1886.

A *bona fide* assignee for value, of a mortgage of land, originally given as consideration for a fraudulent transfer of the land, may foreclose the mortgage, notwithstanding the transfer has been adjudged void as against creditors.*

In a foreclosure suit, defendants, who do not set up any equities as against plaintiff, should not be allowed to litigate between themselves, before a judgment, the question of their priorities of right in the fund or their equities as to the order of sale of parcels of the property, but the plaintiff should have the usual judgment of sale.

It seems, that where a transfer is set aside as fraudulent as against creditors, a mortgage, given by the fraudulent transferee in consideration of the transfer, and assigned to a *bona fide* purchaser for value, is, as between the parties to the fraud and their creditors, chargeable wholly to the former; and on its foreclosure the creditors are entitled to the whole surplus.

Joseph Smart brought this action, in the supreme court, against Egbert Bement and his wife, Isaac Hyde, Jr., Valen-

* See *Malony v. Horan*, 12 *Abb. Pr. N. S.* 389.

tine Everit, and the Bank of Binghamton, to foreclose a mortgage.

William B. Bement, a farmer and mill owner, having indorsed largely for an insolvent man, but still having property sufficient to meet all liabilities, conveyed half of his mill and farm to his son Egbert, pursuant to an arrangement by which the son, instead of leaving home, was to remain and assist in carrying on the business.

Some time subsequently, the father, becoming involved, transferred all his real and personal estate to the son. In consideration of this transfer the son gave the father a mortgage for three thousand five hundred dollars, which the father transferred for value to Smart, the present plaintiff. Hyde and Everit, who were creditors of the father, brought an action against the father and son, and had this latter assignment set aside, for fraud as against creditors. In that action, Smart, the holder of the mortgage, was not made a party, and the validity of the mortgage in his hands was in effect conceded.

Hyde and Everit having thus set aside the second conveyance of an undivided half, issued execution and sold the father's share of the property, and purchased it themselves.

The son also brought an action against his father for a partition of the farm between them, in which he had one-half set off to him by metes and bounds.

When Smart brought the present action to foreclose his mortgage, the only question raised was the question between Egbert Bement on the one side, and Hyde and Everit on the other, as to which part of the land should be sold first.

The judge directed a sale in parcels, the first parcel to be sold being that set off in partition to William B. Bement; and in case that be not sufficient to satisfy the mortgage debt and costs, then to sell the part set off to Egbert Bement.

The supreme court, at general term, on appeal from the judgment, were of opinion that the legal consequence of setting aside the deed or assignment was to avoid the purchase money mortgage, and that the defendants, had they raised this defense against the plaintiff, might have had the mortgage declared void (citing 11 *Paige*, 469; 5 *Den.* 645; 20 *Wend.*

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24; 4 *Hill*, 424); and that on these authorities Egbert Bement, the son, could take advantage of the mortgage being void as against Hyde and Everit, the judgment creditors, and that the latter, having procured the deed on which the mortgage rested to be declared void, were estopped from claiming that it was valid as against the son. They were, however, of opinion that these defendants who were thus litigating this question with each other, had mistaken their remedy, and that they should, instead of asking the court to shift the liability incurred by their omission to defend against the plaintiff, from each to the other, have defended against all liability by proper allegations and proofs against the plaintiff.

Therefore, the only judgment which the court could properly give, since all the defendants had omitted to defend against the plaintiff, was the usual one in foreclosure cases; that the mortgaged premises, or so much thereof as may be necessary to make the requisite amount, be sold, without discriminating in favor of the one or the other.

They accordingly modified the judgment rendered at special term, and decreed, 1, that the premises mortgaged be sold without discriminating in favor of either of the defendants; 2, that the mortgage of the plaintiff be paid out of the proceeds; 3, that the surplus moneys, if any, belonged, one half to Egbert Bement the other half to Hyde and Everit; 4, that Egbert Bement pay the deficiency, if any.

From this judgment the defendants Egbert Bement and Hyde and Everit respectively appealed.

A. J. Vanderpoel, for defendants, appellants;—Cited Judgment at special term in *H. & E. v. Bement*, 308, 309; Judgment at general term, 369; *Edw. on Part. in Chy.* 247; *Chanley v. Lord Dusany*, 2 *Scho. & Lef.* (Appendix), 690-710-718; *Cowrey v. Caulfield*, 2 *Ball & B.* 255; *Code*, § 274, subd. 1; *Ogden v. Glidden*, 9 *Wis.* 46; *McDonald v. Neilson*, 2 *Cow.* 141; *Francis's Max.* 2; *Masters v. Miller*, 4 *T. R.* 320-329; *Lord MANSFIELD*, *Cadogan v. Kennett*, *Cowp.* 434; *Rob. on Fraud. Conv.* 520; *Meux v. Howell*, 4 *East*, 1; *Henriques v. Hone*, 2 *Edw. Ch.* 120; *Drinkwater v. Drinkwater*, 4 *Mass.* 354; *Waterbury v. Westervelt*, 9 *N. Y. (5 Seld.)* 598-605;

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Chapin v. Pease, 10 *Conn.* 63-73; *Willard Eq.* 240, cases cited; *Story Eq.* § 371; 2 *R. S.* 370, § 46; Pettus v. Smith, 4 *Rich. Eq.* 197-199, 204-205; Sands v. Codwise, 4 *Johns.* 536; KENT, Ch. J., opinion, 598, &c.; YATES, J., opin. 585-586; Bean v. Smith, 2 *Mason*, 252-294; Holland v. Cruft, 20 *Pick.* 321; Miller v. Tolleson, 1 *Harp. Ch.* 145; Boyd v. Dunlap, 1 *Johns. Ch.* 478-482; Judd v. Seaver, 8 *Paige*, 548; Braman v. Hess, 13 *Johns.* 52; Brown v. Mott, 7 *Id.* 361; Munn v. Commissa. Co., 15 *Id.* 44; 2 *R. S.* 317, § 1; *Willard Eq. Jur.* 699; Clapp v. Bromagham, 9 *Cow.* 530; reversing *Bromagham v. Clapp*, 5 *Id.* 295; Striker v. Mott, 2 *Paige*, 387; Westfall v. Jones, 23 *Barb.* 9; Nellis v. Clark, 20 *Wend.* 24; Same v. Same, 4 *Hill*, 424; Niver v. Best, 10 *Barb.* 369; Holman v. Johnson, *Doug.* 341-3; Ellis v. Messervie, 11 *Paige*, 467; Evans v. Ellis, 5 *Den.* 645; Union Ins. Co. v. Van Rensselaer, 4 *Paige*, 85; Mackie v. Cairns, 5 *Cow.* 548; Crandall v. Hoysradt, 1 *Sand. Ch.* 40.

Lusburn Birdsall, attorney for defendants, appellants;—Cited 1 *Pars. on Cont.* 385; 3 *R. S.* 691, §§ 109-110; Case v. Boughton, 11 *Wend.* 106; Russell v. Rogers, 15 *Id.* 351; Brockway v. Wells, 1 *Paige*, 617; Jackson v. Parkhurst, 4 *Wend.* 369; Matter of Howe, 1 *Paige*, 125; Nellis v. Clark, 20 *Wend.* 24; affirmed in the court for correction of errors, 4 *Hill*, 424; Paxton v. Popham, 9 *East*, 421; Armstrong v. Taber (MARSHALL'S opinion), 11 *Wheat.* 257; Wheeler v. Russell, 17 *Mass.* 258; Smith v. Hubbs, 1 *Fairfield*, 71; Evans v. Ellis, 5 *Den.* 645; Tylee v. Yates, 3 *Barb.* 225; Ellis v. Messervie, 11 *Paige*, 469.

WRIGHT, J., delivered the following opinion :

[After stating facts.] Upon this narrow question raised between the defendants, as to what part, or which interest in the mortgaged premises, that of the defendant Egbert Bement or that which his father as alleged fraudulently attempted to convey to him in October, 1854, should be first sold under the foreclosure judgment, the action has been pending for nearly six years. The question was one in which the plaintiff had no interest whatever; for the whole premises were subject to the

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lien of his mortgage. The contest has been conducted wholly between the defendants Hyde and Everit, on one side, and the defendant Bement, on the other. Certainly it was of no consequence to the plaintiff, whether Bement's claim, or Hyde and Everit's claim, as to the order of sale, should be preferred; nor could the rights and equities of each defendant as against the other, and on which their respective claims were alleged to depend, be determined in the action. There were no issues of that kind raised by the pleadings. When all the facts as between defendants on the record are before the court, it may have power to determine issues and adjust equities between them; but it is not bound to do so, especially if there be any right of the plaintiff on the record which may be impaired or invaded. That the defendants substantially asked by their answers the insertion of a clause in the decree of sale that might jeopard the interests of the plaintiff, seems to me apparent. Bement was the owner of an undivided half part of the mortgaged premises, and Hyde and Everit held the sheriff's certificate of sale, but no deed of the other undivided half part. In effect, the claim was on the part of Bement that the judgment should contain a provision that the undivided interest claimed by Hyde and Everit in the whole mortgaged premises (for that was the interest they had, if any), should be first sold; and on the part of Hyde and Everit, that Bement's undivided interest should be first sold—not that the farm or mortgaged premises should be sold in specific parcels, as the interest of each party, as alleged, was in the whole. It was easy to see that such a provision might injuriously affect the plaintiff in the collection of his mortgage debt. Yet the judge at special term (under the plaintiff's objection) proceeded to try the issues between the defendants, raised by their answers. Testimony was received wholly on their part, sometimes under objection of one party and then again by the other. Hyde and Everit were allowed to introduce the record of a judgment in an action between themselves and the Bements, to which the plaintiff was not a party, and in which judgment it was provided in express terms that his rights as assignee of the mortgage should not be prejudiced thereby, declaring the deed from William B. Bement to Egbert Bement,

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of the date of October 20, 1854, conveying an undivided half of the mortgaged premises, fraudulent and void as to Wm. B. Bement's creditors, and setting the same aside; to prove, also, the sale, by the sheriff, under one of these executions, on March 10, 1859, of the real estate embraced in and covered by such deed; that they became the purchasers and received the sheriff's certificate of sale, and still owned them; and that the only consideration for the bond and mortgage in suit was the conveyance of October 20, 1854. Bement was also permitted to show the sale and assignment, by William B. Bement, of the bond and mortgage to the plaintiff, and the application of the proceeds thereof to the payment of Bement's debts; also, to introduce in evidence a judgment entered in January, 1860, in an action in the supreme court, wherein he was plaintiff, and William B. Bement was defendant, partitioning the mortgaged premises between them.

[The learned judge here recited the findings in the present action, the substance of which is fully stated above, and continued as follows:]

If there be any merit in the appeal of either of the parties, I have failed to discover it. The plaintiff has obtained, by the judgment of the general term, what I think he was originally entitled to upon the pleadings. He was the assignee of a mortgage covering the whole premises; and no issue was anywhere raised by the pleadings that the amount claimed was not due, nor that the mortgage was not wholly valid in his hands. But if the view be incorrect, that he should have had the judgment appealed from on the pleadings, the case will be searched in vain for any evidence to impeach the validity of the mortgage in his hands, or to show that he was not entitled to enforce it against the entire premises. Clearly, the defendants, as against the plaintiff, have no ground for appeal.

The judgment should be affirmed.

LEONARD, J., delivered the following opinion :

The court below have wholly mistaken the effect of the fraudulent transaction of October, 1854, between the debtor and his son. They were each equally culpable, and the law has no partiality for either of them.

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The judgment declaring the conveyance of October 20 to have been made to hinder, delay and defraud the creditors of William B. Bement, and void as to them, and directing a sale of the lands thereby granted, to satisfy the executions of the said creditors, granted no relief to the parties to the said fraud. As to them, the transaction remained as it was before. Neither could allege their own turpitude as a ground for setting aside the deed or the mortgage. They were forever estopped by those instruments. There was no revesting of the title to the land in William B. Bement by the judgment declaring his conveyance null and void as against Hyde and Everit. The father and son did not thereby again become tenants in common of the land, as if no conveyance had been executed. It was only for the purpose of relief to creditors that the land was subjected to their debt, as if no deed had been executed. Hence, there could be no partition of the lands between William B. and Egbert Bement. As between them, the conveyance was a barrier to their ownership in common. The general term appear to have so considered it, as they refuse to direct a sale in the inverse order of alienation, according to the usual rule in equity, but direct the sale of the mortgaged premises without respect to the division which had taken place.

The effect of this modification, and the further direction to divide the surplus money arising from the mortgage sale between Hyde and Everit and Egbert Bement, is to charge the share conveyed by the fraudulent deed with one-half of the mortgage debt, interest and cost. It gives to Egbert Bement a large portion of the benefit derived from his fraudulent transaction, and to that extent the creditors of William B. Bement are still hindered, delayed and defrauded. What is there in the facts which gives rise to this tenderness for Egbert Bement? The fact found by the judge, that he received no consideration for the mortgage, is wholly immaterial. The want of consideration, arising from the defeat of the fraudulent transaction, is a fact which Egbert is estopped by his mortgage from setting up, either as against his father or any other holder. Were the mortgage held by his father, neither would have any rights which would call for or permit a sale by foreclosure of that

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portion of the land covered by the fraudulent deed. Nor does the fact, also found by the judge, that William B. Bement applied the proceeds of the sale of the mortgage to the payment of his just debts, in any manner sanctify the fraud. The hindrance and fraud, and the consequent damage to creditors, must be overcome, as far as it is in the power of a court of equity to do it, without injury to the rights of innocent third parties.

Had Egbert paid the money for the conveyance of October 20, and had the transaction been committed to hinder, delay and defraud creditors, neither the payment of the money nor its subsequent honest application by the debtor to the payment of other debts would have saved the premises so conveyed from being subjected by a decree in equity to the executions of judgment creditors; and such would have been the result, without any regard to protecting Egbert, or making the money paid by him a prior equitable charge upon the land which he had sought fraudulently to acquire. It is his misfortune, as it was his fault, that this incumbrance was created, and not that of Hyde and Everit. Egbert Bement must bear the consequences resulting from the injuries inflicted upon his father's creditors by the fraudulent act to which he was a voluntary party. A court of equity can extend no protection to Egbert Bement in this transaction, without visiting upon the creditors some portion of the injury arising from the fraud, and, to that extent, making the fraud operative. The plaintiff has purchased a security, of no validity as a lien upon the land conveyed by the fraudulent deed, in the hands of the mortgagee, as against his creditors. It is the purchase by the plaintiff, in good faith and for value, that gives it any validity in his hands, as against the interest acquired by Hyde and Everit. The plaintiff became the owner before the creditors of William B. Bement had made any claim, or given any notice of their equitable rights, affecting a portion of the land covered by the mortgage.

The defendant Egbert Bement made the claim by his answer; and it is between him and Hyde and Everit that the litigation has been conducted. It was necessary for Hyde and Everit to appear and defend, to protect their interest. They are entitled to costs of their whole defense and of the appeals

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SMITH v. N. Y. CENTRAL R. R. CO.

December, 1868.

Where a verbal contract refers to a written instrument not as a contract, but as containing some of the terms of the parol contract, it is not necessary, in order to admit the writing in evidence in establishing the verbal contract, to prove the execution of the writing, but identifying it is enough.

The case of an agreement to deliver a specified number of cords of firewood, to be cut from standing trees, is not a contract for manufacture, but is a sale, within the meaning of the statute of frauds.*

William B. Smith sued defendants, in the supreme court, for wood sold, at Paddleford, and at Farmington.

In the case of the sale at Paddleford there was a written contract, made by defendants with plaintiff and one Brown, and defendants claimed that the wood now sued for was embraced in that contract, or if not, its delivery was authorized by parol stipulations made at the same time as the written contract. Brown assigned his claim to plaintiff.

In the case of the sale at Farmington, plaintiff showed his trees standing, to defendants' agent, and named his price, and declined to make a written contract, and was told he might "haul it on the old contract." He cut and hauled a large quantity and piled it on his own ground, near the station. He testified that the agent consented to this as a place of delivery. The agent said that there being no written contract, he could not measure this wood without express authority from his superior officers. Meanwhile an execution was issued against plaintiff, and the agent accepted the wood as delivered under the contract of one Devoll, and it was paid for by the company, and the money applied on the execution. Plaintiff went on hauling, and piling on his own land, all the quantity agreed for, but the agent did not measure and take the residue.

The details appear fully in the opinion.

* Compare *Parsons v. Loucks*, 48 *N. Y.* 17, affirming 4 *Robt.* 216; *Hoffman v. Passaic Mfg. Co.*, 3 *Daly*, 495; *Stephens v. Santee*, 49 *N. Y.* 35; reversing 51 *Barb.* 532.

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BY THE COURT.—WOODRUFF, J. [After disposing of minor exceptions.]—One objection, however the counsel has treated as not included in the class referred to, but as relating to the competency of evidence, going to the merits of the controversy, viz: to the question whether any, and, if any, what, contract was made between the parties? That exception we are, therefore, called upon to consider; and it raises the question, was it competent to read what is called throughout the case the “old contract,” in evidence, without proving the execution thereof by a subscribing witness?

That depends, in my judgment, singly and solely on the question, whether any of the wood for which this action was brought, and for which recovery was had, was embraced within that contract and delivered under it as a subsisting contract, out of which the obligation of the defendants to make payment arose.

Whether the plaintiff so claimed on the trial is not very clear.

The contract was dated December 1, 1856, and related solely to wood to be delivered by plaintiff and John T. Brown, at Paddleford. It bound them to deliver, on or before August 1, 1857, four hundred to six hundred cords of good, sound, first quality wood, . . . and fifty to seventy-five cords of second quality wood, . . . split, piled, &c.

The plaintiff, examined in support of his own claim, testified: “Brown and I delivered at Paddleford *under the written contract*, in the winter of 1856, 1857, and 1858. There is in the neighborhood of one hundred and fifty cords that has not been measured or paid for. This is the last contract made with the company. Most of that wood lies on the ground of the company; some of it is in the highway. I was at home every time that previous measurements were made under that contract.”

The assignment of Brown to the plaintiff also conforms to this statement, though it describes a less quantity. Thus: Brown assigns “all my right, title and interest to about fifty cords of wood, be the same more or less, which is now corded or piled up at Paddleford’s wood station. . . . being the same wood cut on the premises, bought of Huldah Goodell by said

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W. Barclay Smith, *and drawn and delivered at said station, under a contract made between W. Barclay Smith and John T. Brown, with said railroad company.*"

Although the wood was not drawn until after August 1, 1857, the time of delivery mentioned in the contract, nevertheless, if the plaintiff claimed to recover therefor on the ground that it was drawn, delivered and accepted under that contract, as the testimony of the plaintiff and the assignment of Brown both state, then it is clear that the contract was the operative instrument by which to determine the rights of the parties. In this view the contract was not a matter collateral to the cause of action, but must be directly proved in order to a recovery, and as much so as if the claim had been to recover for wood delivered under it before August 1, 1857; and it follows, that, in this view, it was not competent to read the contract in evidence, as the operative contract upon which the plaintiff sought to recover, unless, nor until, its execution was proved by the subscribing witness, or the failure to produce the witness was properly excused.

On the other hand, the plaintiff's witness and co-contractor, Brown, gives a different account of the matter. He says, that, prior to August, 1857, they had not drawn enough to fill their contract, and that, in the fall of 1857, they drew the remainder; that it was received *and paid for*.

The theory upon which the contract was received in evidence was, that the wood at Paddleford, claimed for in this action, was wood drawn there in 1858, after the written contract had been completely performed, and was in excess of the quantity called for by that contract.

What, then, was the contract or agreement on the part of defendants for this excess? The testimony of the plaintiff excludes the idea that the wood was in excess when he represents it as delivered under the written contract; but his witness, Brown, represents, that when the written contract was made, Young, the defendants' agent, wished him to make the contract for five thousand cords, and that, when plaintiff and Brown declined doing so (stating that they would not bind themselves to bring more than they could get out, but that he, Brown, thought they could get out more than was called for by the

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contract), Young told them to "bring it on and he would take and pay for all they could get on " [out]. "He agreed to pay for all we should deliver, more or less." "The lot was one we purchased with the wood on it, and Young said he knew the woods. We told him if we cut the wood on the lots we would deliver it. Agreed [he agreed] to take it all if we would deliver it. . . This wood now at Paddleford was from that lot. That conversation with Young was *at the time that contract was made*, either in the fall of 1856, or winter of 1857."

This is the evidence relied upon as showing that the defendant purchased the wood at Paddleford, for which the plaintiff claimed to recover in this action, and it is, manifestly, upon the theory, that this wood was delivered in excess of the quantity mentioned in the written contract, and was delivered upon the idea, that this conversation with Young warranted the plaintiff and Brown in delivering all that could be cut from that wood lot, and bound the defendant to receive and pay therefor; that the plaintiff was deemed at liberty to put the written contract in evidence, to ascertain the price and other terms of the parol agreement.

If the reception of the contract in evidence, without calling the subscribing witness, depended solely upon this testimony and its relation to the Paddleford wood, I should greatly doubt the correctness of the ruling.

It permits the inquiry whether, when it is shown that the parties negotiated and entered into a written contract for the purchase and sale of from four hundred to six hundred cords of wood, one of them can be permitted to prove, that at the same time the parties verbally agreed that the quantity of wood might be increased by the seller to a larger number of cords, and that the excess should be paid for upon the terms and at the price named in the writing, and to establish this state of facts, give the writing in evidence without proving its execution.

The objection that all verbal negotiations and stipulations are merged in the writing, forbids any such proof. But as this objection does not appear to have been specifically taken on the trial, the question recurs, was it competent to give the contract in evidence on the other grounds urged?

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If, then, it be assumed that such a verbal contract could be made concurrently with the execution of another agreement in writing, and it is necessary, in order to ascertain the price and terms of the verbal agreement, to produce the writing, is it necessary to prove the execution of the writing, or will it be sufficient to identify it as the writing to which the verbal agreement refers?

This presents the same question as was raised by the proof as to the Farmington wood. The plaintiff alleged, that in October, 1857, nearly one year after the execution of the agreement, Young agreed to buy the Farmington wood from him, upon the terms of the "old contract," *i. e.*, the contract made by plaintiff and Brown.

Here, I think it clear that the case presented an agreement lying wholly in parol; some of the terms of which were contained in a writing used by way of reference, not as containing any operative words of obligation, but as rendering the verbal agreement definite in details.

In this aspect, it is wholly immaterial whether it is signed or not. It is referred to, not as the obligation of the parties, but as a memorandum, showing what obligations the parties verbally assume.

For illustration: Parties agree verbally upon a sale of wheat, and that the price and place of delivery shall be the same as are specified in the memorandum book of the superintendent of a certain mill. Now, it is of no consequence how informal that memorandum may be, nor whether signed by any one. When the memorandum is produced it serves, not to show an obligation, but to fix the terms of an obligation resting wholly in parol, which is thereby definite and certain.

This is true of any paper which, by reference, is made part of a verbal contract; all that is necessary is to identify it as the paper referred to, and when identified it serves the purpose of the reference, whether signed or not signed, whether formal or informal.

There was, therefore, upon the theory on which the case was tried, no error in permitting the written contract to be read for the purpose of fixing the terms and details of the alleged parol agreement.

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The principal question arising on the merits relates to the validity of the parol contracts, and the effect of what was done by the agent of the defendants.

It is quite clear, that the alleged contract for the purchase of the wood was within the statute of frauds. The claim of the plaintiff to treat it as an agreement for work and labor in manufacturing firewood out of standing trees, cannot prevail. It would be indecorous to say that distinctions on that subject have in some instances been made, which seem rather designed to evade the provisions of the statute than to guard against the evils which the statute was designed to prevent. There would seem no very sensible reason for holding, in reference to two verbal contracts with wagon makers for the purchase and delivery of twenty wagons on a future day named, that one is void because the one wagon maker has the wagons on hand, and the other is valid because the other wagon maker must manufacture them in order to their delivery at the time appointed. Without, however, disregarding the cases which hold that, where the substance of the contract is work and labor to be done in converting materials into a new and totally different article, it is not within the statute; we may say that there is no just notion of manufacture involved in an agreement to deliver a specified number of cords of firewood. No change in the thing sold and to be delivered is contemplated. The circumstance that it stands in the woods at the time, involves nothing more than a necessity to cut it, that it may be delivered. In this respect it is not different from a purchase and agreement to deliver wood of a prescribed length, split into pieces of convenient size, the parties knowing and intending that delivery shall be had of wood already cut, but of a greater length and not split at all.

It does not differ from a sale of wheat not yet threshed, held to be within the statute. *Downs v. Ross*, 23 *Wend.* 270. In the case of *Garbutt v. Watson*, 5 *Barn. & Ald.* 613, where a sale of flour by a miller was held within the statute, although not yet ground when the bargain was made, the court of king's bench regard the substance of the transaction, viz: a sale of goods, and not the mere incident that some labor would be necessary to enable the seller to deliver; and regard the case of

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Towers v. Osborn, 1 *Strange*, 506, where the agreement was for the sale of a chariot not yet manufactured, as an extreme case, which ought not to be carried any further. And in Smith v. Surman, 9 *Barn. & C.* 561, where the agreement was for the sale of timber, the trees from which it was to be cut then standing on the vendor's land, the court of king's bench held, 1st, that it was not a sale of growing trees, so as to be a sale of land, or an interest in or concerning the same, but, 2nd, that it was a sale of goods within the statute. BAILEY, J., says: "The vendor, so long as he was fitting it and preparing it for delivery, was doing work for himself and not for the defendant." LITLEDALE, J., says: "Where the contracting parties contemplate a sale of goods, although the subject matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller bestowing work and labor on his own raw material, that is a case within the statute. It is sufficient, if, at the time of the completion of the contract, the subject matter be goods, wares and merchandise." I cannot assent to any case which has decided that such a contract is not within the statute.

But without entering further into the discussion of the broad proposition stated by Justice LITLEDALE, or the differing views expressed in our supreme court in *Downs v. Ross*, I think that here is no just pretense for calling the agreement one for work and labor to be done for the defendant, and that it is plainly within the statute.

If, then, the alleged verbal bargain between the plaintiff and Young, the defendants' agent, for the purchase of wood at Farmington, was within the statute, it was void, and the defendants were not bound thereby.

If liable at all, it is because the plaintiff delivered, and the defendant accepted the wood. The case was sent to the jury upon that view of the law governing the case.

If the case had been submitted to them to determine, upon all the evidence, whether the defendants accepted the wood, or any part of it, as a delivery under the agreement, and the jury had found affirmatively, the only question in this court would be, was there any evidence to warrant the submission of the question to the jury?

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But the question submitted was, whether the jury believed the plaintiff and his witnesses, or believed the agent of the defendants, Young; and they were told that if they believed the former, the plaintiff was entitled to recover; that, if they believed the latter, the defendants were entitled to their verdict.

I think that there was error in this, which may have operated to secure to the plaintiff a verdict to which he was not entitled; for, as it appears clear to me, the jury may have credited the plaintiff's testimony, and it yet be certain that there was no acceptance of this wood or any part of it.

1. In the first place, as to the Farmington wood: According to the plaintiff's statement, Young, in October, 1857, after examining the trees in the woods, consented to take the wood, and proposed to draw up a contract therefor; the plaintiff declined, declaring his unwillingness to bind himself in case he should accept a situation at the West. Young told him that if he did not stay at the West and should return, he might draw it on the old contract. This was neither assented to nor refused by the plaintiff. And, manifestly, at this time, there was no contract whatever. If there were no statute of frauds, here was not even a verbal contract which bound the parties to anything. Afterward, without any renewal of negotiations, or even notice to the defendants of any intent to accept Young's proposal, the plaintiff began to cut the wood, and in February he began to draw wood to Farmington station, and, seeing Young, asked his consent to deliver wood on his own (the plaintiff's) land, and Young consented. As no wood was delivered anywhere else, it is a just inference that this was before any wood was actually drawn. To this stage nothing had occurred which conferred title on the defendants, or which could have prevented the plaintiff making any disposition of the wood which he saw fit; there was nothing which could be construed to be an acceptance of the wood. All that Young had said was prospective.

The actual deposit of wood on the plaintiff's land, near the station, in pursuance of the consent thus given, was not, *per se*, an acceptance, and yet nothing else took place until the plaintiff was, according to his own testimony, distinctly in-

formed by Young that he could not measure the wood which had been brought, because the plaintiff had no written contract; this was about February 22. It may be true that, had the wood been accepted, the fact that the old contract (which is claimed to have been made, by reference, a part of the parol agreement), contemplated a measurement by the defendants to ascertain the sum to be paid, would not prevent a recovery by the plaintiff when the defendants refused to measure; but it is a significant fact that this contract in terms contemplated approval and acceptance by the general wood agent. It was thus one of the very terms of the writing which the plaintiff relies upon to fix the details of the parol agreement, that there should be an actual acceptance before the plaintiff should be entitled to payment for the wood—a refusal to accept without just cause, might make the defendants liable for a breach of contract, but without such actual acceptance the wood would not be theirs, nor would they be liable as for wood delivered and accepted. So the statute, where the agreement is by parol, contemplates some act, or at least assent of the purchaser, either contemporaneous with, or subsequent to, the act of the vendor which constitutes delivery on his part, which act or assent indicates acceptance of the thing sold. Here the first act or declaration of the defendants' agent after the consent that the wood be delivered on the plaintiff's own land, was substantially a refusal to accept it.

To my mind, it is quite apparent from the testimony of the plaintiff and his witnesses, that it was the act of measuring the wood to which he and those of his witnesses who delivered wood, all looked as the act which made the wood the property of the defendants, and entitled them to payment.

With the consequences of a refusal to accept where there was a binding contract, we have nothing to do in this case.

There is no pretense, moreover, that the general wood agent, the very person who, as contemplated by the written contract referred to, was to accept, ever saw the wood, or consented to receive it.

To return to Young: Having distinctly informed the plaintiff that he could not measure the wood because there was no written contract, he also informed him that he was going to

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Albany, and would induce the general wood-agent to allow him to measure the wood. Whatever inferences the plaintiff had been theretofore warranted in drawing from the acts of Young, touching his authority to bind the defendants by purchasing and accepting the delivery of wood, the plaintiff was now distinctly apprised, that, there being no written agreement binding the company, because he had refused to enter into such an agreement, he (Young) had no authority to act in the matter without the authority of the general wood agent, by whom, under the written contract, the wood was to be accepted. He told the plaintiff that he could not measure it, but was going to Albany, and would induce the general wood agent to allow him to do so. Unless acceptance may be inferred not only without the affirmative act or assent of a party, but against his will, here was no acceptance.

Doubtless the plaintiff believed that the approval and acceptance of the general wood agent would be obtained by Young, for he continued to draw wood, but he had become apprised that his wood was not accepted on the mere act of drawing and depositing, and that Young could not measure it, because there was no contract binding the company to receive it. All that took place afterward is in harmony with this; Young constantly declined to measure it, but encouraged him to believe that he would do so at a future time.

The levy of the sheriff upon all the wood which had been drawn and deposited down to March 22, was acquiesced in by the plaintiff, a fact wholly inconsistent with the idea that the wood had been accepted by the defendants. The expedient which was devised by Young, in kindness to the plaintiff, and to assist him in his embarrassment, viz: to deliver the wood to Devoll, who had a written contract with the defendants, that thereupon Devoll might deliver the wood under his contract, and then the agents of the defendants could measure it and pay Devoll therefor (whose payment in turn to the sheriff, would tend to relieve the plaintiff);—all this is quite inconsistent with the idea that the wood had, by acceptance, already become the property of the defendants.

All this the jury may have believed, and there is nothing in the other testimony given by the plaintiff and his witnesses,

which is not consistent with this. How, then, could it with propriety, be sent as matter of instruction to the jury, that if they believed the plaintiff and his witnesses, the plaintiff was entitled to recover?

I am not discussing the evidence under any idea that we are at liberty to review a finding of fact upon the evidence, but only for the purpose of seeing whether the evidence warranted the instruction given by the court. A verdict for the plaintiff was not the necessary legal result of accrediting the plaintiff and his witnesses. On the contrary, the jury, upon the foregoing recited testimony, might have found that the defendants never accepted the wood, and their verdict in that case would have been sustained, and, in my judgment, would have been in most plain conformity to the testimony of the plaintiff himself.

Courts should always, so far as they have power, prevent the statute of frauds from being made itself the instrument of fraud; here the plaintiff was in no such peril. He refused to become bound by a written agreement, and he was very early apprised of its importance by the notice that the agent, Young, could not measure his wood, because there was no such contract.

If the testimony given on behalf of the defendants be considered, there can be no pretense of fraud.

2. The claim of the plaintiff to recover for the wood at Paddleford, stands upon much more slender grounds, and, to my mind, the testimony in regard to that wood, in no wise warranted the instruction to the jury which I have considered.

If any wood was delivered at Paddleford by the plaintiff and Brown, which was not embraced in the written contract,—and this the testimony of the plaintiff himself makes doubtful,—the alleged contract therefor, and the only contract therefor, appears by the testimony of the plaintiff's witness, Brown, to have been made contemporaneously with the making of the written contract.

It is liable not only to the objection, that if made it was verbal and void by statute, but to the further objection, that it is an attempt where the parties had in writing agreed to a purchase, and for a delivery, of a quantity of wood named in the

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writing, to insist upon a contemporaneous parol agreement that the vendor might deliver a greater quantity than the instrument mentioned.

Nevertheless, if a greater quantity was delivered and accepted, the defendants would be bound to pay therefor; but the plaintiff's proof shows no such acceptance, beyond the mere fact that it was drawn to and piled up at the station, and that James Brady, who was in charge of a hand car at that station, told the teamster where to pile it;—unless it be found in Brady's testimony, and he was therefore examined by the plaintiff. He says that "all his orders from Mr. Shaw were to have all the wood that was drawn at that place put close to the track, so as to be got at, and that he told Gilhooly (the teamster), the same as Shaw told him"—that he "was not authorized by Shaw to accept any wood from any body," and that he never did anything with plaintiff's wood except what he told Gilhooly about piling.

Now it must be conceded that when the defendants have legally contracted for the purchase of wood to be delivered at a station, and to be piled as specified in the writing, it is their duty to have some one at the station at the time appointed for delivery, to direct as to the place for piling, and if they have no such agent there, the vendor would be at liberty to pile it without such orders, in any place reasonably convenient for the purposes of the defendants.

But to say that where there is no binding contract of purchase, the general instruction of Shaw (conceding his authority to accept wood not legally contracted for, which is not very clearly proved), would warrant Brady in any act binding them to pay for wood not purchased, I cannot agree.

The mere piling the wood by the plaintiff and Brown, however it may have constituted delivery on their part, was not *per se* acceptance by the defendants, and Brady is one of their witnesses referred to in the instruction in question. He did not assume to buy wood, or to accept wood which had not been purchased; on the contrary, he says he had no authority to accept any wood. He did not assume to direct as to the place of piling wood which had not been purchased; he says he supposed the plaintiff or Gilhooly had a contract.

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All the plaintiff's subsequent efforts to induce the agents of the defendants to measure the wood drawn there in excess of the quantity mentioned in the written contract, failed, and I think that the plaintiff's testimony on this subject, so far from establishing acceptance, proves rejection.

In my judgment, the testimony of the plaintiff and his witnesses, in respect to both parcels of wood, fails to show either a valid contract therefor, or an acceptance thereof by the defendants, upon any contract, express or implied, and whatever inferences the jury might have drawn on the subject, I think it was error to instruct them that if they believed those witnesses the plaintiff was entitled to recover; they might have believed those witnesses, and have yet come to the conclusion that there was no such acceptance.

The judgment should be reversed, and a new trial ordered.

All the judges concurred, except CLERKE and BACON, JJ., not voting.

Judgment reversed and new trial ordered, costs to abide event.

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December, 1854.

Affirming but overruling 5 Sandf. 113.

In a suit for damages on the breach of a contract, the complaint is defective unless it avers a formal tender of performance on the part of the plaintiff (no excuse being shown).

Two mercantile firms mutually agreed each to put out contracts for sale and delivery of produce at future days, all profits of such adventures and all losses, to be equally divided between the firms. *Held*, that the members of one firm were liable with the other, as partners, upon a contract which the other firm made and signed in their own name, pursuant to this agreement.

Israel Smith sued Jacob Wright and Theron Losee, and Austin W. and William H. Otis, and Oliver Glover, in the New York superior court, for breach of contract.

The complaints alleged that the defendants Wright and

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Losee, then composing the firm of Wright & Losee, and the defendants the Otises and Glover, composing the firm of A. W. Otis & Co., mutually agreed to make contracts, in the names of their respective firms, with divers persons, for the sale and delivery of flour and other produce, at a future day, with a view to realize the rise or increase in the prices of produce which they then anticipated would take place in the market, and upon the express agreement that such contracts should be made for the joint account and benefit of said two firms, and that the profits resulting therefrom should be equally divided between them, and the losses, if any, should be borne, by the said two firms, in equal proportions. It did not appear that this agreement was in writing.

The complaint then alleged that in pursuance of this agreement the firm of Otis & Co., for the joint benefit and account of the two firms, entered into a contract in writing with the firm of Collomb & Iselin, which contract was set forth at length. It was signed "A. W. Otis & Co."

The complaint then alleged that Otis & Co. did not deliver the flour or any part thereof, although requested so to do by E. & W. Herrick, who held the contract when the flour was deliverable, and although said E. & W. Herrick were ready and willing to accept the same, and to pay for the same at the rate or price aforesaid, but defendants wholly neglected and refused to deliver any part thereof.

The contract and cause of action was subsequently assigned to plaintiff, who brought this action.

The defendants Wright & Losee demurred, that the contract, being signed by Otis & Co., was not sufficient to charge Wright & Losee; and that it did not appear that any demand of the flour or tender of the price had been made.

The superior court held that the arrangement of the two firms was not a partnership between them; and that if it were, the signature of one of the firms to the contract on which the action was brought would not avail to bind the other firm, unless it be alleged that the parties had agreed that the signature of one firm should bind the other. They therefore sustained the demurrer. Reported in 5 *Sandf.* 113. The plaintiff appealed.

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J. H. Rodman, for plaintiff, appellant.—That the parties were partners, cited *Story on Part.* § 30; *Dob v. Halsey*, 16 *Johns.*; *Everett v. Chapman*, 6 *Cow.* 347; *Champion v. Bostwick*, 18 *Wend.* 172; *Wright v. Hooker*, *Seld. Notes*, No. 6, p. 44. If not partners, but agents one for the other, each signed in their own names for their principals by express authority. 2 *R. S.* 136, § 8; *Story on Agency*, § 270; *Thompson v. Davenport*, 9 *B. & C.* 78; also 2 *Smith Lead. Cas.* 212, and note; *Jones v. Littledale*, 6 *Adol. & E.* 486; *Higgins v. Senior*, 8 *Mees. & W.* 834; *Patterson v. Gaudasequi*, 15 *East*, 62; *Adison v. Gaudasequi*, 4 *Taunt.* 574.

B. W. Bonney, for defendants, respondents.—As to the statute of frauds, cited, 2 *R. S.* 136, § 3; *Davis v. Shields*, 26 *Wend.* 341, 350, 352; *Shindler v. Houston*, 1 *Comst.* 261. That the two firms were not partners together, *Story on Part.* c. 4, §§ 30–52; *Loomis v. Marshall*, 12 *Comst.* 69; *Turner v. Bissell*, 14 *Pick.* 192; *Dob v. Halsey*, 16 *Johns.* 34–40; *Smith v. Wright*, 5 *Sandf.* 113.

EDWARDS, J. [After stating facts].—The first question which is presented is whether the agreement which is set forth in the complaint created a partnership.

The well-established rule is, that if a person partakes of the profits of any branch of trade or business he is answerable as a partner for the losses. The reason of this is that if he takes a part of the profits, he takes from the creditors a part of the fund which is the proper security for the payment of their debts. *Grace v. Smith*, 2 *W. Black*, 998; *Dob v. Halsey*, 16 *Johns.* 34; 3 *Kent*, 27. The only qualification of this rule which has ever been acknowledged is, that when a person stipulates to receive a sum of money in proportion to a given quantity of the profits as a reward for his services, he is not chargeable as a partner. *Story on Part.* 32, 33, 34, 45, and authorities cited in note; *Cary*, §§, 9, 10, 11; *Gow*, 14, 19; *Collyer*, 14, 15, *et seq.* And the propriety of even this qualification was doubted by Lord ELDON. *Exp. Hamper*, 17 *Vcs.* 401. In the present case, according to the terms of agreement between the defendants, the business was to be carried on for

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their joint account and benefit, and not only were the profits arising therefrom to be shared between them, but the losses were also to be borne by them in equal proportions. There is nothing in the agreement which in the least degree indicates that the shares of any of the parties were to be received as a compensation for services rendered. In the case of *Champion v. Bostwick* (11 *Wend.* 571; S. C. in error, 18 *Id.* 175), it was shown that three persons ran a line of stage-coaches from Utica to Rochester, the route being divided between them into three sections, the occupant of each section furnishing his own carriages, horses, and drivers, and paying the expenses of his own section; but the money received, as fare of passengers, deducting therefrom only the toll paid at turnpike gates, was divided amongst the parties in proportion to the number of miles run by each. Upon this state of facts, it was held that they were jointly liable as copartners to a third person, not a passenger, for an injury received through the negligence of the driver of the coach of one of them. In the case of *Everitt v. Chapman* (6 *Conn.* 347), the parties had agreed that each one should manufacture and sell the portion so manufactured by him, each party to participate in the profits. It was held that all the parties were liable as copartners to a third person, who sold hides to one of the parties, in ignorance of the partnership, and charged the same to him.

These cases have introduced no new principle, and I have alluded to them merely because they are in many respects similar to the one before us. The fact that the agreement in question was made between two firms already in existence, can make no difference as to the liability of the parties, for, as far as the agreement is concerned, the two firms stand upon the same footing as two individuals would. Neither can it make any difference that the contract which is now sought to be enforced as the joint contract of the parties, was made in the partnership name of one of the firms, for the partnership agreement between the defendants authorized such a contract. *Wright v. Hooker*, 10 *N. Y.* 51; *Everitt v. Chapman*, *ubi sup.* The court below, in giving their opinion, say that "the ground upon which a participation in the profits of a trade is held to make parties liable to third persons, though they never

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intended to be partners between themselves, as it was advanced by DE GREY, Ch. J., in *Grace v. Smith*, and was adopted in *Dob v. Halsey*, is entirely wanting in this case. Here Wright & Losee could not take any of the fund on which the creditors of Otis & Co. relied for payment."

If the court mean that Wright & Losee could not take any of the fund which constituted the capital stock employed in the separate business of Otis & Co., or the profits arising therefrom, or that Wright & Losee could not take any of the fund employed in their joint business, except so far as it constituted the profits arising from such business, the remark is correct, although it is not apparent how that can have any bearing upon the question before us. But if the court mean that the interest which Wright & Losee had in the profits of that business which was carried on under the agreement with Otis & Co. did not give them a right to take any part of the fund upon which the creditors in respect to such business relied, the remark is founded upon an entire misconception of the general rule, and of the decision referred to; for DE GREY, Ch. J., expressly says that, "if any one takes part of the profits, he takes a part of that on which the creditor relies for payment." All the interest which is necessary to constitute a partnership is an interest in the profits, and such an interest necessarily constitutes a partnership, unless, as has been stated, the interest in the profits is given as a compensation for services. The error into which the court below have fallen, is in confounding a community of interest in the property out of which the profits are to arise with a community of interest in the profits themselves. The latter is all that has ever been considered necessary to create a partnership as against a third person. Whether the defendants were partners as between themselves, it is not necessary to inquire. They were so in reference to third persons, and the court below erred in coming to a different conclusion.

But, although there is sufficient allegation of a copartnership, still, I think that the complaint is defective in not alleging a performance, or, what is regarded as equivalent, an offer or a tender of performance on the part of the plaintiff, or those through whom he claims. The contract in suit was for

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the sale of flour, at a price agreed upon. The payment of the price was the consideration for the delivery. The payment and the delivery were to be concurrent acts, and, as was recently held by this court in the case of *Lester v. Jewett*, 11 N. Y. (1 Kern.) 453, neither party is entitled to recover from the other without alleging an offer or tender of performance on his part. I think that for the reason last stated, the complaint is defective, and that the judgment should be affirmed.

SOLMS v. RUTGERS FIRE INSURANCE COMPANY.

June, 1867.

Reversing 8 Bone. 578.

The mistake of naming one who has no interest, as the insured in a policy of fire insurance, is cured by an indorsement, made by the secretary with notice of such mistake, stipulating that the loss, if any, is to be payable to a mortgagee named.

A recovery may be had in the name of the real party in interest in such a case, for the indorsement may be regarded as a new contract of insurance with him.*

* See *Wolfe v. Security Ins. Co.*, 39 N. Y. 49; *Shearman v. Niagara Fire Ins. Co.*, 40 Id. 526, affirming 2 *Sweeny*, 470.

It is not essential to the validity of a contract of insurance that the insured should be named in the policy. If the name of the one for whose benefit the insurance is made does not appear upon the face of the policy, or if the designation used is applicable to several persons, or so imperfect that it can not be understood alone, extrinsic evidence may be resorted to, to ascertain the meaning of the contract. And when thus ascertained, it will be held to apply to the interests thus ascertained to have been intended to be covered by it, and those persons are to be deemed to be comprehended within it, who were in the minds of the parties when the contract was made. *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; affirming 51 *Barb.* 647; see also *Noyes v. Hartford Fire Ins. Co.*, 54 N. Y. 668. Thus an insurance for the benefit of the estate of A. may be shown by extrinsic evidence, to have been for the benefit of both administratrix and heirs. *Clinton v. Hope Ins. Co.* (*above*); and see *Savage v. Howard Ins. Co.*, 52 N. Y. 502; reversing 44 *How. Pr.* 40; 43 *Id.* 462.

So, where the owners of property procure a policy for their own protec-

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Henry Solms sued defendants, in the New York superior court, as assignee of Mary Entwistle and Charlotte Quisse, to recover on a policy of fire insurance.

In April, 1866, Charlotte Quisse, owner of the property insured, in Westchester county, sent her husband, A. H. Quisse, to obtain such insurance, and gave him fifty dollars to pay the premium. He went to New York, and applied to the Stuyvesant Insurance Company for the whole amount of insurance, informing them that it was to be insured for Charlotte Quisse, who owned the property. The policy was to be afterward delivered. The company accepted the risk, and received from him the premium. The Stuyvesant Company, not wishing to assume the whole risk, applied to the defendants, who agreed to insure twenty-one hundred dollars of the amount.

The next day one Burnett, who was an insurance broker

tion, they may recover thereon, although the policy be expressed to be for the benefit of whom it may concern. *Mayor, &c. of N. Y. v. Hamilton Fire Ins. Co.*, 10 *Bow.* 537; affirmed on another ground in 39 *N. Y.* 45.

So, where there is a valid oral agreement, for insurance, and the policy issued and accepted contains material errors, and the premium is paid at less than the rate agreed and authorized, the original agreement may be sustained to indemnify the insured. *Bunten v. Orient Mut. Ins. Co.*, 8 *Bow.* 448; affirmed on another point in vol. 1 of this series, p. 257.

But as to a mistake of the agent in not cancelling the policy when directed to do so,—see *Goit v. National Protection Ins. Co.*, 25 *Barb.* 189.

In *Hughes v. Mercantile Mut. Ins. Co.*, 55 *N. Y.* 265, reversing 44 *How. Pr.* 351, it was—*Held*, that although a mistake, in this case, in the name of the vessel insured, would be no obstacle to a recovery, if both the parties, in fact, had the same vessel in view, and the insurers, when the policy was issued knew the true name, or intended to insure the vessel lost; yet when there is a mistake as to the vessel sought to be insured, and the policy is upon another vessel than that for which application was made, no contract exists, as the minds of the parties did not meet. The fact that the insurers were put upon inquiry, which they neglected to make, does not alter the case.

In *Bodine v. Exchange Fire Ins. Co.*, 51 *N. Y.* 117, it was—*Held*, that the agent of an insurance company has implied power to delegate to his clerk, authority, within the scope of the agency, and the acts of the clerk will accordingly bind the company.

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both for the Stuyvesant Company and the defendants, and in the employ of both for the purpose of procuring applications and negotiating policies, and who acted for the defendants in this respect, in procuring the insurance in question, made a survey of this property, at the request of the Stuyvesant Company. Burnett knew that the property was owned by Mrs. Quisse, and on this occasion was informed that the insurance was desired by her, as both Mr. and Mrs. Quisse testified. Burnett testified that Quisse said he wished the insurance in his own name. Before the policy was issued, Burnett, with the assent of the Stuyvesant Company, informed the defendants of the application, who agreed to take half the risk, and paid Burnett for procuring the insurance. The name of the person insured was written "A. H. Quisse," in both policies. The Quisses were Germans, and ignorant.

About a week afterwards, A. H. Quisse, the husband, called again, and the Stuyvesant Company gave him two policies upon the property, one for two thousand one hundred dollars, executed by the defendant, and one for nineteen hundred dollars, executed by itself, both insuring A. H. Quisse, the husband, instead of Charlotte, the wife. A. H. Quisse did not know this, but spoke about there being two policies, when he expected but one; but was assured defendants' company was good, and that it was all right, and he took the policies.

On November 7 the mistakes in the policies were first discovered by Charlotte and A. H., when Charlotte was called upon for additional security for certain mortgages given by her. She then authorized an attorney to procure them to be corrected, and to have, in addition, the losses made payable to the respective mortgagees—the policy in question being intended for the benefit of Mary Entwistle. The attorney's clerk proceeded with the policy in question to the defendants' office, and presented the same to defendants' secretary, and informed him that the property in question belonged to Mrs. Quisse, and that she wanted the loss, if any, made payable to Mrs. Mary Entwistle. The secretary, without making any verbal reply, and without correcting the name of the insured in the policy, indorsed on the policy the loss payable as requested, and re-

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turned the policy to the clerk, who received it, supposing it all right.

After a loss by fire, Charlotte Quisse and Mary Entwistle each assigned their claim to the plaintiff, who brought this action.

Upon the trial the only defense was that the insurance was to the husband, and the title was in the wife. The cause was tried before a jury, and the judge, upon the plaintiff's proofs, dismissed the complaint upon defendants' motion, to which plaintiff excepted.

The superior court affirmed the judgment, on the ground that there was no evidence that defendants were informed, at or before issuing the policy, that Mrs. Quisse was the owner; and the facts raised a presumption that when requested to correct the policy in this respect, they either did not understand the request or refused it. Reported in 8 *Bosw.* 578.

Plaintiff appealed.

Thomas Darlington, for the plaintiff, appellant;—Cited *Kelly v. Commonwealth Ins. Co.*, 10 *Bosw.* 82; *Angell on Ins.* §§ 35, 68, and cases cited; *Whitaker v. Farmers' Ins. Co.*, 29 *Barb.* 312; *McEwen v. Montgomery Co. Ins. Co.*, 5 *Hill*, 101; *Sexton v. Same*, 9 *Barb.* 191; *Masters v. Madison Co. Ins. Co.*, 11 *Id.* 624; *Bunten v. Orient Ins. Co.*, 8 *Bosw.* 448; *Greenl. on Ev.* §§ 291, 301, and the cases there cited; 10 *Bosw.* 82, before cited; *Carpenter v. Mutual Safety Ins. Co.*, 4 *Sandf. Ch.* 408; *Lightbody v. N. A. Ins. Co.*, 23 *Wend* 18; *Code*, § 275; *Emery v. Pease*, 20 *N. Y.* 62; *New York Ice Co. v. Northwestern Ins. Co.*, 23 *Id.* 357; *Marquat v. Marquat*, 12 *N. Y.* (2 *Kern.*) 336.

Livingston M. Miller, for the defendants, respondents;—Cited *Barker v. Marine Ins. Co.*, 2 *Mas.* 369; *Graves v. Boston Marine Ins. Co.*, 2 *Cranch*, 419; *De Forest v. Fulton Fire Ins. Co.*, 1 *Hall*, 84; *Grosvenor v. Atlantic Ins. Co.*, 17 *N. Y.* 391.

GROVER, J.—The plaintiff showed no right to relief upon the ground that there was a mistake in making out the policy

originally by the defendant. Although the evidence showed that the application made for insurance upon the property, to the Stuyvesant Company, by A. H. Quisse, was for insurance in behalf of Charlotte Quisse, the owner of the property, yet there was no evidence tending to show that any such application was made by that company to the defendants, nor but that the defendants made the policy in strict accordance with the application and agreement entered into. It is clear that no recovery could be had upon the policy as made, because A. H. Quisse was the party thereby insured, and he had no interest in the property, either at the time of making the insurance, or at any time thereafter, and consequently had sustained no loss, and therefore had no claim for indemnity.

The ground entitling the plaintiff to relief, if any, was the presentation of the policy to the defendants' secretary, by the clerk of Thorne, the clerk at the time informing the secretary that Charlotte Quisse owned the property, and wanted the loss, if any, made payable to Mary Entwistle. The secretary must be presumed to have understood this, as there was no contradictory evidence. The taking the policy and making an indorsement thereon making the loss payable as requested, without expressing any dissent to regarding the policy as a valid one in behalf of Charlotte Quisse, the owner, must be regarded as an agreement on his part to make a valid policy to her upon the property. The company had already received the premium for a valid insurance upon the property, to the amount expressed in the policy. It had executed and delivered a policy, supposed to be valid, but which, through mistake, probably of the Stuyvesant Company, was a mere nullity. This transaction with the clerk, unexplained, required the finding of an agreement by the defendant to insure Charlotte Quisse, the owner of the property, in consideration of the premium already received.

Whether the secretary supposed the policy was made to her originally, as the assured, and believed the remark of the clerk, that she owned the property and desired the loss made payable to Mrs. Entwistle, to show that the change in that respect was desired by the assured; or whether, through inadvertence, the correction was omitted, does not appear, nor is it

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material. At any rate, the assent of the secretary to an agreement to insure Mrs. Quisse does appear.

It is well settled that an agreement by parol to insure, and to make out a policy, when the terms are all understood, is binding upon the insurer, and will be enforced in the courts. In this case, I think, this agreement of the secretary was a valid contract, binding upon the company, and that, as the evidence stood at the time of the motion to dismiss the complaint was made, the plaintiff was *prima facie* entitled to recover. The judge, therefore, erred in dismissing the complaint.

The judgment should be reversed, and a new trial ordered.

HUNT, J. [After stating above facts.]—I think the judgment is erroneous. Mrs. Quisse paid to the defendants her money for an insurance upon her property. The defendants received her money, intending so to insure her, and supposing they had insured her to the amount of two thousand one hundred dollars. If they had any knowledge of the error, and intended to receive or to retain her money, allowing her to suppose that she had a valid insurance, when they understood it to be otherwise, they were guilty of a fraud which will afford them no protection. That the mistake of the name was a mere mistake, and that it was the mistake of the defendants' agent, Burnett, was proven by the testimony of both Mr. and Mrs. Quisse. On a nonsuit, all disputed facts are to be assumed in favor of the plaintiff. This is, therefore, to be assumed as the true state of the case. Burnett knew that the property was that of Mrs. Quisse, and was informed, while examining the same on behalf of the defendants, that the insurance was desired in the name of Mrs. Quisse. The defendants knew, not only what the property was, its nature and character, but knew who made the application, and who was the party desiring the insurance. The knowledge of their agent was the knowledge of the defendants. *McEwen v. Montg. Co. Ins. Co.*, 5 *Hill*, 101; *Masters v. Mad. Co. Ins. Co.*, 11 *Barb.* 624; *Bunten v. Orient Ins. Co.*, 8 *Bosw.* 449; affirmed court of appeals.* I think all these circumstances

* Reported in vol. 1 of this series, p. 257.

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establish a contract on the part of the defendants with Mrs. Quisse, and that if the property had been destroyed, intermediate the receipt of their portion of the premium by the defendants, and the issuing of their policy, the defendants would have been liable to her for the two thousand one hundred dollars. The evidence of Mr. Quisse, who testified that he made the application to the company in that form, and of Mr. and Mrs. Quisse, who testify that they so informed the defendants' agent while he was examining the premises, and the retention of the money by the defendants with that knowledge, gave all the essentials of a valid contract of insurance in favor of the party so applying and paying. *Kelly v. Com. Ins. Co.*, 10 *Bosw.* 82; *Whitaker v. Farmers' Ins. Co.*, 29 *Barb.* 312; *Angell on Ins.* § 35, and cases cited; *Johnson v. Talman*, in court of appeals, not reported.

The transaction which took place when the error was discovered, I think also relieves the case from its difficulty. It is not pretended that there was any error in the character of the risk, the amount of the premium, or, at that time, in the name of the individual to be insured. The defendants were distinctly informed that there was an error in the name of the party insured; that it should be Charlotte Quisse, instead of A. H. Quisse; that the former was the owner of the property; and they were desired to correct it, or to make a suitable memorandum upon the subject. They made a memorandum, consenting to the assignment desired, but containing nothing on the subject of the erroneous name of the person insured, and handed back the policy. It was distinctly proven that they were informed of the error at this time. What was the intention, and what was the legal effect of this return of the policy, with a consent indorsed that the loss should be paid to Mary Entwistle? The intent could honestly be no other than to redeliver the policy after this information, and to insure anew the property described. If the defendants can be supposed to have reasoned with themselves that "there was an error, we will say nothing about it, we will keep the premium and avoid a liability if a loss should occur," the well-settled principles of law and morality would compel the indemnity to the party claiming. The defendants will be compelled to perform the

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contract, as they allowed the other party to understand it, and to suppose that they understood it. I doubt not that the intention of the defendants in returning the policy to Mrs. Quisse's agent, uncorrected, after being advised of the error, was to reissue and redeliver the same, disregarding the error, and such was its legal effect. The act of the defendants was either a trick unworthy of a respectable company, or it was a statement to Mrs. Quisse that she might regard her policy as valid, notwithstanding the error, and that if any loss occurred it should be paid to Mrs. Entwistle, in the same manner as if the correct name were therein inserted.

On this point the argument in the court below was to the effect that these acts were only proof, either that the defendants did not understand that any request was made to them to alter the policy, or, if they did so understand it, they refused it, as they had a right to do. The evidence was distinct that the request was made to the secretary of the company, and there was no pretense, in fact, that it was not understood. If the secretary has so testified, a question would have been presented for the consideration of the jury, and if they had found with the defendants on that question, it would have ended the point. Neither is it just to say that if they did understand it, the company refused the request to make the alteration, as they had a right to do. On the contrary, they assumed to grant it, allowed and induced the assured to understand that the matter was entirely satisfactory to them, and never intimated a refusal or dissatisfaction, until called upon to make good the loss. If they had refused the correction, the assured could have supplied the want by a new insurance. They did not, however, refuse, and cannot now justify themselves on that ground.

I think a new trial should be ordered.

All the judges concurred.

Judgment reversed, and new trial ordered, costs to abide the event.

STAATS v. HUDSON RIVER RAILROAD COMPANY.

December, 1866.

A statute which does not take away any right nor impose a substantially new duty, but regulates, with additional requirements, a duty imposed by a previous act, is not to be deemed inconsistent with the previous act.*

Thus the provision of the general railroad act, making the section requiring companies to construct fences and gates applicable to pre-existing companies, if not inconsistent with their charters, makes it apply to a company whose charter required it to construct fences and left it to the land owners to make gates.

The provisions of law requiring railroad companies to fence, &c., are to be regarded not merely as a regulation between land owners, but are to have an extended application as a police regulation for the safety of the public.†

Philip S. Staats sued defendants, to recover damages for running over his horse, which escaped from its pasture, through a gate that was out of repair, upon the track.

The company's charter (L. 1846, c. 216, § 24), contained the following clause: "Said corporation, before running any cars upon the said railroad, shall erect and thereafter maintain upon the sides thereof . . . a fence of such height and strength as is by law required, as a division fence, . . . but this section shall not prevent persons owning or occupying lands adjoining the said road from erecting at proper and convenient places, where they may have occasion for crossing the said road for farming and other necessary purposes, suitable gates in the line of said fence, to facilitate such crossing, and to be kept in repair by the person using the same."

* Compare *People v. Tilphaine*, 3 *Park. Cr.* 241; *S. C.*, 13 *How. Pr.* 74; *Village of Rome v. Knox*, 14 *Id.* 268; *People v. Snyder*, *Id.* 78; *Moore v. Westervelt*, 3 *Sandf.* 762; *Bartle v. Gilman*, 18 *N. Y.* 260; *Mitchell v. Halsey*, 15 *Wend.* 241; *Harbeck v. Mayor, &c. of N. Y.*, 10 *Bosw.* 366; *Devoy v. Mayor, &c. of N. Y.*, 36 *N. Y.* 449; affirming 39 *Barb.* 169; *Livingston v. Haines*, 11 *Wend.* 329; affirming 3 *Paige*, 523.

† Compare *Labussiere v. N. Y. & New Haven R. R. Co.*, 10 *Abb. Pr.* 398; *Langlois v. Buffalo, &c. R. R. Co.*, 19 *Barb.* 364; *Abb. Dig. of Law of Corp.* 643-646.

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The general railroad law subsequently passed (*L.* 1850, c. 140, § 44), requires every corporation *formed under its provisions* "to erect and maintain fences, . . . with openings or gates or bars therein. . . . Until such fences and cattle guards shall be duly made the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon, and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or willfully done." *

Another section (49) declared all existing railroad companies to be subject to the provisions of this and other sections, *not inconsistent* with the provisions of their charter.

A subsequent act (*L.* 1854, c. 282, § 8), contains a clause requiring that "Every railroad corporation, whose line of road is open for use, shall, within three months after the passage of this act, and every railroad company formed, or to be formed, but whose lines are not now open for use, shall, before the lines of such railroad are opened, erect and thereafter maintain fences on the sides of their roads, . . . with openings or gates or bars therein, at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads, and shall also construct, where the same has not already been done, and hereafter maintain, cattle guards at all road crossings. . . . And so long as such fences and cattle guards shall not be made, and when not in good repair, such railroad corporation and its agents shall be liable; . . . and when such fences and guards shall have been duly made, and shall be kept in good repair, such railroad corporation shall not be liable for any such damages, unless negligently or willfully done."

The supreme court held, that the general acts did not apply to this company.

Lyman Tremain, for plaintiff, appellant;—Cited *Phelps v. McDonald*, 26 *N. Y.* 82; *Abb. Dig.* 1 ed. p. 17, § 16; p. 79, § 310, cases cited; *United States v. Palmer*, 3 *Wheat.* 610; *Smith*

* See *Murray v. N. Y. Central R. R. Co.*, vol. 3 of this series.

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Com. on Stat. & Const. L. §§ 556-560; *Suydam v. Moore*, 8 *Barb.* 365; *Milliman v. Oswego & S. R. R. Co.*, 10 *Id.* 87; *Tal-
mage v. R. & S. R. R. Co.*, 13 *Id.* 493; *Corwin v. N. Y. & Erie
R. R. Co.*, 13 *N. Y.* (3 *Kern.*) 42; *Brooks v. N. Y. & Erie R.
R. Co.*, 13 *Barb.* 596; *Marsh v. N. Y. & Erie R. R. Co.*, 14 *Id.*
364; *Langlois v. Buffalo & Rochester R. R. Co.*, 19 *Id.* 366;
Underhill v. N. Y. & Harlem R. R. Co., 21 *Id.* 489; *Waldron
v. Rensselaer & Saratoga R. R. Co.*, 8 *Id.* 394; *Poler v. N. Y.
Central R. R. Co.*, 16 *N. Y.* 476; *Hance v. C. & S. R. R. Co.*,
26 *Id.* 428.

John H. Reynolds, for defendants, respondents;—Cited cases
mentioned in the opinion, and *Hance v. C. & S. R. R. Co.*, 26
N. Y. 428.

BY THE COURT.—JAMES C. SMITH, J.—The only question
is, whether it was the duty of the defendants to keep the gate
in repair. The plaintiffs claim, that the duty was imposed
upon the defendants by the statute of 1850, known as the Gen-
eral Railroad act, and, if not thereby, then by section 8 of
chapter 282 of *Laws of 1854*, amending the act of 1850.

Section 44 of the act of 1850 expressly imposes upon all
railroad corporations to which it applies, the duty of erecting
and maintaining fences on the sides of their road, with open-
ings or gates or bars therein, for the use of the proprietors of
the adjoining lands. But it is a question whether that section
is applicable to the defendants, who were an existing corpora-
tion at the time of the passage of the act of 1850, they having
been chartered by a special act in 1846. Section 49 of the act
of 1850 subjects all railroad corporations within this State,
existing at the time of the passage of said act, to all duties,
liabilities and provisions contained in certain specified sections
of said act, including section 44, *not inconsistent* with the pro-
visions of their charter. The duty created by section 44 of
the act of 1850, therefore, attaches to the defendants, unless it
is inconsistent with some provision of their charter. The de-
fendants claim that it is inconsistent with the provisions of
section 24 of their charter [quoted above].

The argument on the part of the defendants is, that this

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section subjects the land owners to the duty of erecting and maintaining gates, while the act of 1850 imposes such duty upon the railroad company; and thus the two provisions are inconsistent with each other, and, consequently, the latter does not apply to the defendants.

It is to be observed, however, that the act of 1846 does not impose upon the adjoining owner or occupant an absolute duty to erect and maintain gates. It *permits* him to erect them; and, in case he avails himself of the permission, it makes it incumbent on him to repair them. If he does not choose to erect a gate, he is under no obligation to do so, and, of course, is under no duty to repair. But the duty of the railroad corporation to erect and maintain *fences* on the sides of their road is absolute; and the adjoining land owners may insist upon its performance. If all the land owners on the line of the defendants' road had seen fit to waive the permission to construct gates given to them by the statute, as they might have done, the defendants would have been bound, by the terms of their charter, to erect and maintain a fence on each side of their road throughout its entire length, except where it intersected public highways or was inaccessible to cattle. Practically, the case would then have been the same as if the charter had not given permission to the land owners to erect gates. What new duty was imposed upon the defendants by section 44 of the act of 1850? Simply, that the fences, which they were previously required to erect and keep up, should be constructed with gates or bars therein, when necessary to the land owners, instead of being immovable throughout. The new obligation is merely a modification of the former one—a specification of the mode, so to speak, in which the prior obligation is required to be performed. The fence required, whether with gates or without them, is but an ordinary erection for the purpose of restraining cattle from getting upon the track of the railroad; and a provision prescribing either mode of construction can hardly be regarded as inconsistent with a statute creating an obligation to erect the fence and maintain it.

We are referred to the cases of *Visscher v. Hudson River R. Co.*, 15 *Barb.* 37, and *Clarkson v. Same*, 12 *N. Y.* 304, which

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hold that the provisions of the general railroad act, in respect to the mode of acquiring title to land for a roadway, are inconsistent with the provisions of the defendants' charter upon the same subject, and, therefore, do not apply to the defendants. An examination of those decisions shows that they proceeded upon very substantial grounds, which do not exist in the present case. The defendants' charter, as amended in 1848 (*L. 1848, p. 39, c. 30*), and the general act, prescribed essentially different and incongruous modes of proceeding to acquire title to land, each complete in itself. Under the charter, a notice to the party was to be served or published ten days; the general law required four weeks' publication. The charter authorized proceedings in the superior court of the city of New York, or in the supreme court in any county of the State, for the appointment of five commissioners or appraisers, to be selected by the court, from the State at large. By the general law, the supreme court, in the district in which the land was situated, had sole jurisdiction; each party nominated six commissioners, from whom the court selected two on each side, and appointed the fifth; and the commissioners were all required to live in the county in which the land was situated. Under the charter, the roadway might be of any width required; by the general act it was limited to ninety feet. The charter provided that, on filing the report of the commissioners, the court, on proof of payment or deposit of the money, should make a rule reciting the proceedings, which, on being recorded, should operate as a deed to the company. Under the general law, notice was to be given of an application to confirm the report, an appeal was authorized, and twenty days were allowed for appealing. In reference to these discordant provisions, Justice PARKER said, in *Visscher's case*: "The two modes of assessing damages and obtaining title are incompatible and incongruous. The requirements of the general act are not additional to those of the charter. They cannot be ingrafted upon the charter." In *Clarkson's case*, DEAN, J., delivering the opinion of the court, said: "For these sections to apply to the defendants' manner of acquiring title, they must be consistent with the provisions of the defendants' charter. That is, not that they must be identical, but that,

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although they may differ in requiring something in addition to what was to be done before, they must not, in their requisitions, take away any of the rights to which the defendants were entitled under the charter." These extracts show the course of reasoning adopted in those cases. Tested by it, the provisions of the general act upon the point now under discussion, are not inconsistent with the defendants' charter. They do not deprive the company of any right; they impose no new duty; they simply regulate the performance of a duty which was imposed upon the defendants by their charter. If these views are correct, section 44 of the act of 1850 applies to the defendants, and makes it their duty to keep the gate in repair.

If it be assumed, however, that the section does not apply, let us see how the case stands under section 8 of the act of 1854 [quoted above].

The defendants are, undoubtedly, within the operation of this section, unless, as is claimed by them, it applies only to cases where fences and gates had not been constructed at the time that act was adopted. That claim is not warranted by the language of the section, and, in my judgment, does not accord with its meaning. In describing the corporations to which the section relates, its framers used the comprehensive words, "*every* railroad corporation;" and they specified, as well those corporations whose lines were then open for use, as those whose lines were not then open. In the case of *Corwin v. N. Y. & Erie R. R. Co.*, 13 *N. Y.* 42, 53, DENIO, J., speaking of section 44 of the act of 1850, expressed the opinion that it "is not to be regarded as merely a regulation respecting division fences, between the land of the railroad corporations and those of adjoining property, but that it is rather to be considered as providing a safeguard for the protection of the lives of persons traveling by railroad, and of the property in animals, which citizens in the vicinity of those roads may own." This remark of the learned judge is justly applicable, also, to the section we are called upon to construe; and the fact that the section was intended, in a great measure, as a police regulation for the safety of the traveling public, strengthens the conclusion that it was designed to have the general scope indicated

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by its language, and to prescribe a uniform rule for the government of every railroad company in the State. It provides for two distinct acts, the *erecting* of fences and gates, and the *maintaining* them; and although the former provision was unnecessary in cases where suitable fences and gates had already been built, yet the latter provision was useful in those cases, as well as where the fences and gates were thereafter to be constructed. Each provision is to be taken distributively, and to be applied to the cases in which it can have effect, *reddendo singula singulis*. Several other sections of the same act clearly apply to all the railroad corporations in the State, whether then existing or thereafter to be formed, and whether created by special charter or organized under the general law. §§ 7, 10, 14, 17.

No question can arise as to the power of the legislature thus to amend the defendants' charter, as it contains an express reservation of the legislative power to alter or repeal it; and besides, section 22 of the charter subjects the corporation to the general restrictions and liabilities prescribed by title 3 of chapter 18 of part I. of the Revised Statutes, section 8 of which provides, that the charter of every corporation, that shall thereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

I am of opinion that defendants were charged with the duty of keeping the gate in repair, and, therefore, the judgment should be reversed, and a new trial ordered.

All the judges concurred, except DAVIES, Ch. J., and LEONARD, J., who did not vote.

Judgment reversed, and new trial ordered, costs to abide the event.

STAIGER v. SCHULTZ.

September, 1867.

In actions of an equitable nature—e. g., for an injunction—it is discretionary with the court in which the action is brought to grant or refuse

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costs. The amendments to the Code of Procedure, passed in 1863, did not affect this rule.

An order of such court, directing that the plaintiff may discontinue action without costs, is not reviewable in the court of appeals.*

Jacob Staiger sued Jackson S. Schultz and others, the commissioners of the metropolitan board of excise, in the N. Y. common pleas, to restrain defendants from enforcing the excise law of 1866, on the ground that it was unconstitutional.

The common pleas held the act to be constitutional; and plaintiff was allowed on motion to discontinue without costs, and entered judgment accordingly. Defendants appealed, on the ground that they were entitled to costs.

George Bliss, Jr., attorney for defendants, appellants;—Cited *Code*, §§ 304, 305, 306; 53; 11, subd. 2; *Worden v. Brown*, 14 *How. Pr.* 327; 2 *R. S.* 613, §§ 1, 2; 1 *Barb. Ch.* 225, 226; *Lewis v. Germond*, 1 *Paige*, 300; *Hammersley v. Barker*, 2 *Id.* 372; *Palmer v. Van Doren*, 3 *Edw.* 384; *Rogers v. Holly*, 18 *Wend.* 351; *Dixon v. Parks*, 1 *Ves. Jr.* 402; *Anon.*, *Id.* 140; *Fidelle v. Evans*, 1 *Bro. C. C.* 267; *Lancashire & Y. R. R. Co. v. Evans*, 14 *Beav.* 529; *South Staffordshire R. R. Co. v. Hale*, 16 *Jur.* 160; *Pennell v. Wilson*, *MSS. Sup. Ct. General Term*, 1867; *Seaboard & Roanoke R. R. Co. v. White*, 1 *Abb. Pr.* 49; *S. C.*, 18 *Barb.* 595, 598; *Averill v. Patterson*, 10 *N. Y.* (6 *Seld.*) 500; *McGregor v. Comstock*, 19 *N. Y.* 581; *Decker v. Gardiner*, 8 *N. Y.* (4 *Seld.*) 29; *Bank of Geneva v. Reynolds*, 33 *N. Y.* 160; reversing 12 *Abb. Pr.* 81; *S. C.*, 20 *How. Pr.* 18; *Rapalee v. Stewart*, 27 *N. Y.* 310; *Betts v. Garr*, 26 *Id.* 383; *Bartle v. Gilman*, 18 *Id.* 260; *S. C.*, 17 *How. Pr.* 2; *Bates v. Voorhees*, 20 *N. Y.* 525; *Livingston's Petition*, 2 *Abb. Pr. N. S.* 1; *S. C.*, 34 *N. Y.* 555; 32 *How. Pr.* 20; *Beach v. Chamberlain*, 3 *Wend.* 366; *Cruger v. Douglass*, 8 *Barb.* 81; *Russell v. Conn*, 20 *N. Y.* 81; *Travis v. Waters*, 12 *Johns.* 500; *Johnson v. Taber*, 10 *N. Y.* (6 *Seld.*) 319; *Spencer v. Spencer*, 11

* Compare *Leslie v. Lealie*, 10 *Abb. Pr. N. S.* 64; affirming 3 *Daly*, 194; *De Barante v. Deyermant*, 4 *N. Y.* 355.

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Paige, 308; *Chappell v. Purday*, 2 *Phill.* 227; *Power v. Reeves*, 10 *House Lds. Cas.* 655; *Angell v. Davis*, 4 *M. & Cr.* 360; *Simpson v. Westminster Pal. Hot. Co.*, 2 *De G. F. & H.* 153; *Ely v. Holton*, 15 *N. Y.* 600; *Giraud v. Beach*, 4 *E. D. Smith*, 33; *S. C.*, 10 *How. Pr.* 369; *Noble v. Trotter*, 4 *Id.* 322; *S. C.*, 3 *Code R.* 35; *Silliman v. Eddy*, 8 *How. Pr.* 124; *Sunney v. Roach*, 4 *Abb. Pr.* 16; *St. John v. Hart*, 16 *How. Pr.* 192; *Ludlow v. Hackett*, 18 *Johns.* 252; *Merritt v. Arden*, 1 *Wend.* 91; *Biscoe v. Wilks*, 3 *Meriv.* 456; *In re Vaucene*, 31 *How. Pr.* 289; *Code*, § 33, subd. 2; § 119; *Wendell v. Wendell*, 3 *Paige*, 510; *Wilde v. Jenkins*, 4 *Id.* 500; *Stafford v. Mott*, 3 *Id.* 100; *L.* 1866, c. 578, §§ 16, 22; 31 *How. Pr.* 333 and note; *Id.* 343.

Philip F. Smith, for plaintiff, respondent;—Cited *Code*, §§ 304, 306; *Nicoll v. Town of Huntington*, 1 *Johns. Ch.* 166; *Demarest v. Wynkoop*, 3 *Id.* 129; *White v. Foljambe*, 11 *Ves.* 337; *Scott v. Thorp*, 4 *Edw.* 1; *Johnson v. Taber*, 10 *N. Y.* (6 *Seld.*) 319; *Pattison v. Hull*, 9 *Cow.* 747; *Getman v. Beardsley*, 2 *Johns. Ch.* 274; *Eastburn v. Kirk*, *Id.* 317; *Sanger v. Wood*, 3 *Id.* 416; *Cunningham v. Freeborn*, 11 *Wend.* 241; affirming 3 *Paige*, 557; 1 *Edw.* 256.

BY THE COURT.—BOCKES, J. [After stating facts.]—It is first insisted, that the defendants were entitled to costs as a matter of legal right on dismissal of the complaint, or its equivalent, the discontinuance of the action; and sections 304 and 305 of the Code of Procedure are relied on in support of this position. As these sections stood prior to the amendment of 1862, no question could arise. Prior to that amendment, costs were most clearly in the discretion of the court, in equity actions. Section 304 declared that costs should be allowed to the plaintiff upon a recovery in the cases therein specified, among which were actions of which, “according to section 54, a court of a justice of the peace had no jurisdiction.”

Section 305 provided that costs should be allowed of course, to the defendant in the actions mentioned in section 304, unless the plaintiff was entitled to costs therein; and by section 306, in other actions costs were to be allowed or not, in the dis-

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cretion of the court. The "other actions" here alluded to, embraced equity actions in which costs would be given or withheld, as the court should direct.

This is very plain; indeed is conceded by all. But by the amendment of 1862, the words "according to section 54" were omitted in subdivision 3 of section 304; and it is insisted that as the section now stands, the plaintiff is entitled to costs in all cases of a recovery by him in an action of which a justice of the peace has no jurisdiction, and as a consequence, by section 305, the defendant must have costs in all such cases if the plaintiff be not entitled to costs.

This construction, however, renders meaningless subdivision 1 of section 306, which declares that "in other actions costs may be allowed or not, in the discretion of the court." It is indisputable that this paragraph embraced equity actions prior to 1862. It was introduced principally, if not solely, with a view to a fair and just imposition of the burden of litigation, according to the equities of the particular case. This right had been exercised by courts having equity powers from time immemorial, and was always deemed essential to the proper exercise of equity jurisdiction.

We cannot believe that the legislature intended to effect so great a change, in the absence of any express declaration to that effect. Had such intention existed, it would not have been left, as we conceive, to mere construction. Especially must we so conclude when such construction renders other provisions of law nugatory.

All the provisions bearing on the subject under consideration should be read together, and should be so construed as to take effect in harmony. Governed by this rule of interpretation, the right to give or withhold costs to a party in equity cases rests in the discretion of the court, as declared by section 306, and such discretion it is not the province of this court to direct or control.

Again: it has always been the practice to permit actions to be discontinued, in the discretion of the court, without costs, even in suits at law, when the defendant had obtained a discharge under the insolvent law, and in many other cases. Such permission existed as a matter of practice, resting in

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the discretion of the court, and could not be overruled on appeal.

The numerous cases cited by the appellant's counsel, showing in what instances the court of equity jurisdiction will refuse permission to discontinue, without costs, have no pertinency in this court. Those cases were proper for the consideration of the court on the hearing of the application. They were authorities on the question of practice in that court. But this court has not the power to correct errors of practice in the inferior court. We are also cited to various statutes in relation to costs, and particularly to 2 R. S. 613, § 1, which provides that a plaintiff, in dismissing his bill or petition in a court of equity, shall pay to the defendant his costs to be taxed, except in certain cases there specified. But the Code abrogated these statutory provisions, and declared when, and under what circumstances, parties were entitled to recover costs, and they can now have them in no other cases. We are of the opinion that the order and judgment appealed from must be affirmed, but without costs of appeal.

All the judges concurred in dismissal of appeal from orders without costs, and affirmance of judgment without costs.

Judgment affirmed, without costs of appeal.

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September, 1864.

A mortgagee, who by fraud of the owner of the equity of redemption is induced to release part of the land from the lien of the mortgage, and thus enables the latter to convey it, which he does, so that the lien of the mortgage cannot be restored, is entitled to recover from him the amount of the lien so released; not merely the deficiency which may result on the mortgage.*

* In *SLOCUM v. FREEMAN* (December, 1867), it was held that, where, upon an agreement to satisfy a judgment on receipt of a note of a third person, *with interest*, the creditor delivered a satisfaction-piece in escrow, and the debtor wrongfully obtained the satisfaction-piece by giving to

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Jane and Jane B. Stebbins brought this action, in the supreme court, against Matthias H. Howell and Theodore Browning. The complaint, after setting forth the facts stated in the opinion, alleged, that the fee in the remaining lot was in Browning, subject to the agreement for purchase, held by Howell; that said Browning was made a party, and that his

the holler in escrow a note *without interest*.—*Held*, that the creditor could maintain an action to have the judgment restored.

His demand was not reduced to the amount of the note he had agreed to receive in settlement.

Hiram Slocum brought this action against Pliny and Adam M. Freeman, to compel a cancellation of a satisfaction of a judgment he had recovered against defendants, March 17, 1853, for the sum of two thousand two hundred and nine dollars and nineteen cents.

Plaintiff, after recovery of the judgment, agreed to settle for seven hundred and sixty-three dollars and ninety-five cents, to be secured by the note of defendant, Pliny, payable in thirty months, *with interest*. To carry out the agreement, he signed and acknowledged a satisfaction-piece, which he delivered to one Martin, with instructions to deliver it to defendants on the receipt of the note for the amount, and payable with interest, but not to deliver it on any other terms.

The referee found that defendants had not complied with these terms, but on the contrary, Martin delivered the satisfaction-piece to Pliny Freeman, under the impression and belief that the note which he then received for the plaintiff conformed to the agreement, whereas the note was not drawn payable with interest, as the agreement required. Martin, in due time, and as soon as he discovered the mistake, returned the note to Pliny Freeman, for correction, who then retained the note, and refused to execute a note in conformity with the agreement, or to restore the satisfaction-piece, as he was requested to do; and instead thereof he refused to execute and deliver a note in conformity with said agreement, or to return the satisfaction-piece to be filed, and the judgment to be marked canceled of record.

The supreme court, at general term, held that the satisfaction-piece should be set aside, and the judgment restored to full effect, for its whole amount (except the sum of two hundred dollars, which had been paid), "but that such judgment should not be a lien on any real estate or chattels real conveyed since the satisfaction of said judgment to *bona fide* purchasers or incumbrancers by said defendants, or either of them, before the commencement of this action.

One of the judges, however, was in favor of reducing the judgment to the amount and interest stipulated for by the compromise.

Defendants appealed.

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interest in the lot was about fifteen hundred dollars. That the plaintiffs had applied to Browning for his consent in writing, to have the whole amount due on the mortgage charged upon said lot, the fee of which was in him, but that he had refused to consent to the same.

The plaintiffs prayed that Howell be directed to restore the said mortgage lien upon said lot; or pay to the plaintiffs the sum of two thousand seven hundred and fifty dollars and interest, as the consideration of the release of the mortgage lien, fraudulently obtained by him.

T. R. Westbrook, for the respondent;—Cited *Bailey v. Day*, 26 *Mo.* 88; *White v. Jordan*, 27 *Id.* 370; *Eve v. Wirily*, 2 *Strobh.* 203; *Buckingham v. Oliver*, 3 *E. D. Smith*, 129; *Dederick v. Leman*, 9 *Johns.* 333; *Seymour v. Minturn*, 17 *Id.* 169, *Lownds v. Remsen*, 7 *Wend.* 35.

DAVIES, Ch. J. [After stating the facts.]—The appellants submit no points. The defendants asked for no affirmative relief.

Upon the facts found by the referee the judgment was clearly correct, and as there does not appear to have been an exception taken, nothing is reviewable in this court except the conclusions of law found by the referee. If they are correct there is nothing for this court to pass upon.

It is too plain to need argument or authority to sustain the position that, upon these facts, the plaintiff was entitled to judgment. The original judgment was agreed to be satisfied on certain specific terms and conditions. The defendants did not comply therewith, and, therefore, they were not entitled to have the judgment satisfied except upon payment of the amount due thereon. It is not pretended that they have ever done or offered to do this. They did, however, wrongfully obtain a satisfaction-piece, prepared and executed by the plaintiff, and deposited by him with a third party, to be delivered on the defendants complying with said terms and conditions. They obtained that satisfaction-piece without complying with said terms and conditions, wrongfully if not fraudulently, and used the same in procuring the cancellation of said judgment of record.

The plaintiff was entitled to have said satisfaction-piece canceled, and the lien of said judgment restored. This has been done by the judgment entered in this action, properly guarding the rights of *bona fide* purchasers or incumbrancers since said judgment was canceled of record.

The judgment was in all respects correct, and should be affirmed with costs.

All the judges concurred, except PORTER, J., not voting.

Judgment affirmed, with costs.

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Judgment was given for plaintiffs against the defendant Howell, for two thousand seven hundred and fifty dollars, being one-half the amount due upon said mortgage, with interest from September 26, 1857. Howell appealed to the court at general term, where the judgment of the special term was affirmed, whereupon he appealed to this court.

Solomon L. Hull, for the defendant, appellant;—Cited *Howard Ins. Co. v. Halsey*, 8 *N. Y.* 271; *Lafarge Ins. Co. v. Bell*, 22 *Barb.* 55; *Boyd v. Vanderkamp*, 1 *Barb. Ch.* 273; *Morris v. Slater*, 1 *Den.* 59; *Northrup v. Northrup*, 6 *Cow.* 296.

John P. Crosby, for plaintiffs, respondents.



BY THE COURT.—WRIGHT, J.—The case is this. The plaintiffs held a mortgage, given in February, 1856, for five thousand five hundred dollars, on two building lots in the city of New York. In March, 1857, certain parties who had become the owners in fee of the mortgaged premises, contracted to sell the lots to the defendant Howell, he agreeing to erect a dwelling-house on each lot, of a definite description, and complete the same by March 1, 1858. Howell was to be entitled to a deed of the premises, when the houses were inclosed, on paying the purchase money, less the plaintiffs' mortgage; and the deed was to contain a clause subjecting and binding him to the payment of the incumbrance. Howell commenced forthwith to build the houses under the agreement. In August, 1857, while the houses were being built, and were inclosed, by a fraud of Howell or bad faith on his part, the plaintiffs lost the lien of their mortgage on one of the lots, and the other may or may not be ample security for the sum of five thousand five hundred dollars. It certainly is not, without the building on it. But whether it is or not, is of no consequence whatever. Howell paid nothing for the release of the lien of the plaintiffs' mortgage, and never had any right to it, except upon his performing in good faith the contract in pursuance of which the delivery of the release was anticipated. In August, 1857, representing himself to the plaintiffs to be the owner of both lots, when in fact, he had the title to neither, he applied to

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them to release the mortgage lien on one of the lots, and lend him an additional sum on the remaining lot. It was agreed to release the lien on one lot and loan him the further sum of one thousand dollars, which was afterward extended to fifteen hundred dollars, on the other lot. Of course the release and the additional loan were intended to be simultaneous transactions; and the agreement for both was manifestly based on the supposition that Howell was the owner of the whole mortgaged premises. Otherwise the release of one-half of the premises from the operation of the mortgage was without any consideration whatever, and the plaintiffs were placed in jeopardy of a loss of one-half their mortgage debt.

The agreement was not immediately consummated, and in the meanwhile, under the pretense that he would carry it out, and the plaintiffs relying on his good faith, Howell obtained the release, and afterward persistently declined to perform on his part, although there was no difficulty in his doing so. It turned out that he had but an equitable interest in the lot not released, but was entitled to a deed of the same on the payment of fifteen hundred dollars—the exact amount which the new loan would have extinguished had the agreement been carried out; and the party holding the fee was ready and willing to execute such conveyance to him on receiving that sum. After procuring the release, however, and having it recorded, he refused to proceed any further in consummating the agreement; giving as the reason for non-performance on his part, that the money was not forthcoming from the plaintiffs when he wanted it; that the time had gone by for selling the houses on the lots, and he would have to pay the interest and taxes on the lot not released from the lien of the mortgage, which, as between him and the person holding the title, the latter ought to pay.

It seems to me to require but a simple statement of the case to show the correctness of the judgment of the court below. The defendant, Howell, having obtained the release, if not under false pretenses and misrepresentations or concealment of the truth, yet without any consideration, and without carrying out the arrangement into which he had expressly entered, should be compelled to restore the plaintiffs to their former

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conditions as to the security. It is no answer whatever for him, that, as that part of the mortgaged premises with the building thereon is worth double the sum secured by the plaintiffs' mortgage, no damage could result to them by his surreptitiously obtaining a release of one-half the mortgaged premises. The value of their security is lessened one-half, and to that extent by the defendant's fraud or bad faith they are put in jeopardy of loss. As the release could not be recalled, and that part of the mortgaged premises released was of equal value with what remains subject to the lien, the only equitable mode of restoring the plaintiffs to their original condition, as their security, was that adopted.

The judgment should be affirmed.

A majority of the judges concurred.

HOGBOOM, J., delivered an opinion in favor of modifying the judgment, so as to make it a judgment against Howell for *deficiency* only.

Judgment affirmed, with costs.

 STEVENS v. WATSON.

September, 1865.

A mortgage of all the property of a railroad company already or afterward to be acquired, in equity binds after-acquired property, as against the mortgagors, and all persons claiming under them, except purchasers for value and without notice; and especially as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage, and against junior judgment creditors.*

A specific equitable lien upon land is preferred to a subsequent legal lien by judgment.†

* Compare *Seymour v. Canandaigua, &c. R. R. Co.*, 25 *Barb.* 284; *S. C.*, 14 *How. Pr.* 531; *Fisk v. Potter*, vol. 2 of this series, p. 138; *Benjamin v. Elmira, &c. R. R. Co.*, 49 *Barb.* 441; *Watson v. Campbell*, 28 *Id.* 421.

† Otherwise, where the judgment is one confessed to secure money advanced on the faith of it by the judgment creditor. *Hulett v. Whipple*, 53 *Carb.* 224. Where the equitable lien and the judgment lien come into existence at the same time, the former is not entitled to preference

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The legal presumption is that the after-acquired lands were necessary for the company, and were properly acquired by it. Illegality by reason of usury cannot be imputed to the contracts of corporations as borrowers.*

John A. Stevens and others, as trustees, brought this action against Stephen V. R. Watson and others, and the Buffalo, Corning & New York Railroad Company, in the supreme court, to foreclose a mortgage given by the company to plaintiffs as trustees, in April, 1852, to secure the payment of one million dollars for which bonds were then issued.

The mortgage was expressed to cover the railroad, as well the part "now constructed as the part thereof which may or shall be hereafter constructed, together with the right of way of said road, lands, rails, bridges, buildings, erections, structures, fixtures and appurtenances thereunto belonging, and all the franchises or rights now owned by or belonging to the corporation or that may be owned by or belong to them hereafter; together with all the locomotives, tenders, cars, carriages, tools and machinery now owned or hereafter to be owned by said corporation, or in any way belonging or appertaining to said road and used thereon." There was a covenant for further assurance.

When this mortgage was executed the company was in process of acquiring title to the lands it was to use, and subsequently it acquired the title to a tract of land on which it located machine-shops and depot, and also purchased some rolling stock.

In 1853, and after acquiring the aforesaid property, the company made a second mortgage, in similar terms, to the defendants Miller and others, which mortgage was expressed to be subject to the one given to the plaintiffs.

Still later, Watson, who was made a defendant in this action,

unless it was created on a new consideration advanced on the faith of it. *Dwight v. Newell*, 4 *N. Y. (3 Comst.)* 185.

* See *Butterworth v. O'Brien*, 23 *N. Y.* 275; affirming 7 *Abb. Pr.* 456; *S. C.*, 28 *Barb.* 187; and, as to national banks, *First Nat. Bk. of Whitehall v. Lamb*, 50 *N. Y.* 95; reversing 57 *Barb.* 429; and compare *Matter of Wild*, 8 *Abb. Law J.* 235.

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recovered a judgment against the company, which remained unsatisfied.

Upon the trial of the present action of foreclosure, the second mortgage bondholders and Watson insisted that the plaintiffs' mortgage could not bind the after-acquired property as against them, and Watson also relied on a charge of usury in the plaintiffs' bonds.

BY THE COURT.—WRIGHT, J.—I am of the opinion that the appeal is without merit. The plaintiffs' mortgage was a valid lien upon all the property of the mortgagors (the railroad company) embraced within the terms of the mortgage, whether owned by the company at its date or whether subsequently acquired. It is unnecessary to go the length of the proposition (though I think it might be successfully maintained) that the plaintiffs, as mortgagees of the franchises of the corporation, are entitled to the subsequently acquired property as an incident to the franchise mortgage, and as an accession to the subject of the mortgage. Be this as it may, in equity the mortgage of the subsequently acquired property is valid, and may be enforced against the mortgagors, and all other persons, except purchasers for value and without notice.

The covenant for further assurance, contained in the plaintiffs' mortgage, operates as an equitable lien upon the after-acquired property.

The trustees in the second mortgage (Miller and Sampson) and Watson were not *bona fide* purchasers, nor entitled to preference. These trustees took their mortgages expressly subject to the plaintiffs' mortgage; and Watson, at most, had but a general lien by judgment on the equity of redemption. It is clear that, as against the mortgagors, the plaintiffs' mortgage is a lien in equity on all the property owned at its date or afterward acquired, and the defendant Watson, whether he claimed as a bondholder under the second mortgage, or as a judgment creditor, can have no greater right, as against the plaintiffs, than the railroad company (the mortgagors) have.

The trustees of the bondholders under the second mortgage, beside having notice of the prior mortgage, took their mortgages subject thereto, and a lien by judgment is always subor-

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dinate to a prior equitable lien, whether of record or not, or executed or not. The plaintiffs' mortgage was, in equity, a specific lien on the real estate of the company, and a specific equitable lien upon land is entitled to a preference over a subsequent legal lien by judgment. If, as is now asserted, the plaintiffs' mortgage never was a lien on the lands acquired by the company at Corning for the erection of a machine-shop and depot, the judgment appealed from could do him no harm. But I think the judge rightly decided that the plaintiffs' mortgage was a lien.

The legal presumption is that these lands were necessary for the use of the company, and were properly acquired; and, if acquired for its use, they became annexed to the franchise and inseparable from it.

It was alleged in the answer of the defendant Watson, and proved on the trial, that some of the bonds secured by the plaintiffs' mortgage were negotiated and sold by the company at less than par, and, for this reason, it is urged the mortgage is usurious and void. The objection is susceptible of various answers; but a conclusive one is that the mortgage, being made by a corporation as the borrower, the statutes of usury have no application to it.

In *Rosa v. Butterfield*, 33 *N. Y.* 665, it was held that the act of April 6, 1850, (*L.* 1850, c. 172), prohibiting corporations from interposing the defense of usury, has the effect to except from the operation of the statutes of usury contracts of corporations stipulating to pay interest.

This being the construction given to the act mentioned, the contract in this case is not impeachable for usury.

If there is no statute limiting the rate of interest upon loans to corporations, illegality or taint of usury cannot be imputed to their contracts as borrowers.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

Stewart v. Smith.

STEWART v. SMITH.

March, 1864.

Modifying 39 Barb. 167.

Where a widow, having recovered in an action of ejectment for dower, applies to have her dower admeasured, notice to all owners of the freehold is not essential.

The case is governed by 2 R. S. 303, 312, §§ 53, 57, and not by 2 R. S. 488, § 2; and notice to the attorney of the parties to the action, is sufficient.

Where dower was to be assigned in a building used as a dwelling house and store, and the commissioners set it off by running lines through the premises, regardless of rooms, closets, passage-ways, &c., so as to render a portion of the building useless,—*Held*, that the report of the commissioners could be vacated, on motion of the owners of the property.*

Mary Stewart, claiming dower as widow of William Stewart, deceased, having recovered judgment in an action in the nature of ejectment against Andrew Smith and others, subsequently obtained an order appointing commissioners to admeasure her dower. On the coming in of the report of the commissioners, the report was vacated, and an appeal taken.

The supreme court, on this appeal, affirmed the order vacating it, upon the ground that notice of the application for the appointment of commissioners had not been given to all the owners of the land claiming a freehold interest therein, as required by 2 R. S. 488, § 2. The court were also of opinion that the commissioners erred in the method of assigning dower, which was by dividing the property by lines that ran regardless of rooms, closets, passage-ways, &c., rendering a portion of the building almost useless. Reported in 39 Barb. 167.

The plaintiff appealed to this court.

* By subsequent legislation, the dowress may be compelled to receive an annual sum. 2 R. S. 489, as amended by L. 1869, c. 433. Or the court may order a sale to pay her a gross sum if she will accept it. L. 1870, c. 717.

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George W. Stevens, for plaintiff, appellant.

John H. Reynolds, for defendants, respondents.

BY THE COURT.—HOGEBOM, J. [After questioning the appealable character of the order, a point not passed on by the court.]—I think the supreme court were in error in supposing that, in a case like this, notice of the proceedings to admeasure dower was necessary to be given to the owners of the land claiming a freehold estate therein. This is not an original proceeding in this court for the appointment of admeasurers of dower (2 R. S. 488), but a mere supplement to an action of ejectment in which the plaintiff has already succeeded in establishing her right to dower. The case is, therefore, governed by the provisions of section 55 of that title of the Revised Statutes which treats of the action of ejectment (2 R. S. 303, 311, 312, §§ 55, 57), and not by the title before quoted.

It is reasonably clear that this section contemplated a proceeding by, and notice only to, the parties to the action. It is but the sequel to the action of ejectment. It declares that upon the filing of the record of judgment, the court, upon the motion of the *plaintiff*, shall appoint commissioners to admeasure the dower; and that their report may be appealed from by any *party to the action*.

And although the section declares that the commissioners shall have like powers and obligations and proceed in like manner as commissioners appointed pursuant to title 7 chapter 8 of the act (being the title before quoted), this does not, I think, mean that their appointment shall be *procured* upon a similar notice. The parties are in court who are to be affected by the assignment of dower. The statute requires the ejectment proceedings to be against the party in possession, but if he be a mere tenant, he is obliged by law to give notice of the action to his landlord, and he is subjected to a heavy forfeiture if he do not. 1 R. S. 748, § 27. The landlord may be let in to defend. 2 *Id.* 342, § 17. He usually does so. He did so in this case, as is sworn to in the papers on the part of the defendant. The attorney in the suit, therefore, to whom notice is given is his attorney, and he has had opportunity to defend both the

ejectment suit and the subsequent proceedings to admeasure dower.

It has also been held, or at least, intimated, in a reported case in this court, that in these proceedings notice is not necessary to any one except the party to the action. *Ellicott v. Motier*, 7 N. Y. 201, 206.

But, although the supreme court set aside the report mainly upon this ground, it appears from the opinion of the court at general term, that they affirmed the order of the special term in part, upon the ground that the report was wrong upon the *merits*, or in regard to the *mode* of admeasurement. They say: "We think, also, the commissioners erred in assigning the dower so as to render the buildings almost useless to both parties." We may conclude that the court at special term was influenced by like considerations. They had the statutory right to set aside the report on this ground (2 R. S. 490, 491, § 16), and if we have the right to review that question on this appeal, I am of opinion that the power was judiciously exercised, and that the mode of assigning the dower was inequitable and injurious, and could have been performed, within the principle of the reported cases (*White v. Story*, 2 *Hill*, 543; *Coates v. Cheever*, 1 *Cow*. 460, 463), in a much more just and judicious manner. On that ground I am inclined to affirm the substance of the order.

If the order appealed from had been simply an affirmance of the order at special term, that would have been all which it would have been necessary to say. But the court, acting, doubtless, upon the idea that the proceedings were fatally defective unless notice was served upon the owners of the freehold, annexed this clause to the order of affirmance: "and that the proceedings be dismissed unless the petitioner elects to amend within ten days from the entry of this order." I think this clause was erroneously inserted, and that so much of the order appealed from should be reversed, and the residue affirmed.

As both parties are in fault, I think neither should recover costs against the other on this appeal.

All the judges concurred.

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Order reversed, so far as it provided for amendment and dismissal in default thereof, and in other respects affirmed, without costs.

***STOVER v. EYCLESHER.**

September, 1867.

Affirming 46 Barb. 84.

A court of equity will uphold an assignment of a bare possibility or expectancy,—*e. g.*, that of an heir apparent in the estate of his living ancestor,—when made in good faith, and for value or to secure a precedent debt.*

A power of attorney containing words showing an intent to vest an interest, is sufficient as an assignment, within this rule

Jacob Stover brought an action of partition of land, in the supreme court, against Thomas W. Clark, Jacob C. Eycleshimer, John B. Sherman and others, and obtained a decree for sale of the premises and distribution of the proceeds.

The share of proceeds originally pertaining to John L. D. Eycleshimer as heir at law of his father, the common ancestor, was claimed both by the defendant, Jacob C. Eycleshimer, as a judgment creditor of John L. D., and by John B. Sherman as an assignee, by an assignment executed before Jacob C. recovered his judgment.

John P., the father, died intestate, June 10, 1861, leaving the premises in question, and John L. D., a son and heir. Three years previous to the father's death, John L. D., being then indebted to one Caroline M. Sherman, gave her a power of attorney, expressed to be an "irrevocable power of attorney and coupled with an interest, to ask, demand, sue for, recover and receive all such interest, estate, property and effects, real and personal, as I now have, or at any time hereafter may have or claim as heir at law, devisee, legatee or next of kin of my father, John P. Eycleshimer, of . . . and to compromise and settle the estate of my said father and any estate or inter-

* Compare *Rome Exchange Bank v. Eames*, pp. 83, 98 of this vol., and *Sheridan v. House*, p. 218, and cases cited in note.

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est I have or may hereafter have or claim therein, . . . and apply the same respectively to the payment of a debt of \$1,500, or upwards, in which I am now justly indebted to her." This instrument was under seal, and was recorded. Shortly after the father's death, Caroline M. Sherman, by virtue of the power, conveyed John L. D.'s interest in his father's estate, and all her interest therein, to John B. Sherman; and the amount of the interest was insufficient to satisfy the debt.

After the execution of the power and the death of the father, but before the power was recorded, Jacob C. Eyclesheimer commenced an action against John L. D., issued an attachment as a provisional remedy, and seized the interest of John L. D. in his father's estate, and filed a notice of the pendency of the action.

After the power of attorney had been recorded and the grantee of the power had executed the assignment to John B. Sherman, Jacob C. recovered judgment in this action.

The supreme court were of opinion, that, although the instrument could not be sustained as a mere present assignment or quit-claim, because there was no present interest, it might be sustained as a contract which by fair construction was to take effect on the vesting of a future interest; and might take effect on the death of the father as an equitable assignment or mortgage, some stress being laid on the fact that it was an irrevocable power to sell and apply proceeds to pay a pre-existing debt. Reported in 46 *Barb.* 84.

Defendant appealed.

R. A. Parmenter, for defendant, appellant;—Cited *Jackson Bradford*, 4 *Wend.* 619; *Jackson v. Waldron*, 13 *Id.* 178; *Tooley v. Dibble*, 2 *Hill*, 641; *Munsell v. Lewis*, 4 *Id.* 642; *Edwards v. Varick*, 5 *Den.* 665; *Nicoll v. N. Y. & Erie R. R.*, 12 *N. Y. (2 Kern.)* 133, 139; 4 *Kent*, 9 ed. 289; *Willard Eq. Jur.* 461; *Lintner v. Snyder*, 15 *Barb.* 621; *Miller v. Emans*, 19 *N. Y.* 385; 3 *R. S.* 5 ed. 13, § 35; *Lawrence v. Bayard*, 7 *Paige*, 76; *Jackson v. Wright*, 14 *Johns.* 193; *Jackson v. Murray*, 12 *Id.* 201; *Jackson v. Stevens*, 13 *Id.* 316; *Vanderheyden v. Crandall*, 2 *Den.* 25; *Jackson v. Hubble*, 1 *Cow.* 613; *Wright*

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v. Delafield, 25 *N. Y.* 266; 1 *Story Eq. Jur.* § 1040, b; *Hobson v. Trevor*; *Beckley v. Newland*, 2 *Peere Williams*, 181, 191; *Edwards v. Varick*, 5 *Den.* 694; *Stalker v. McDonald*, 6 *Hill*, 93-96; *Youngs v. Lee*, 12 *N. Y. (2 Kern.)* 555; *Dwight v. Newell*, 3 *N. Y. (3 Comst.)* 185; *Chase v. Peck*, 21 *N. Y.* 581; *Field v. Mayor, &c. of N. Y.*, 6 *N. Y. (2 Seld.)* 179.

John H. Reynolds, for plaintiff, respondent;—Cited 2 *Story Eq. Jur.* § 1040, note 3; 2 *Spence Eq. Jur.* 852-854, 865; *Fonblanque Eq.* 213, note e; *Hobson v. Trevor*, 2 *Peere Wms.* 191; *Beckley v. Newland*, *Id.* 182; *Carleton v. Leighton*, 3 *Merivale*, 667; *Field v. Mayor, &c. of N. Y.*, 6 *N. Y. (2 Seld.)* 179; *Fitzgerald v. Vestal*, 4 *Sneed (Tenn.)* 258; *Whitford v. Faust*, 1 *Ves.* 387; *Stone v. Liddendale*, 2 *Ans.* 533; *Cook v. Field*, 15 *Ald. & E.* 450; *Chase v. Peck*, 21 *N. Y.* 581; *Bush v. Lathrop*, 22 *Id.* 535.

BY THE COURT.—BOCKES, J. [After stating facts].—The question then is, who had the better right, the appellant, who claimed as an attaching judgment creditor, or the respondent, who claimed as an equitable purchaser or assignee, holding the position of Caroline M. Sherman, whose rights he had acquired.

In point of time, the latter had the priority, for at the decease of the intestate, June 10, 1861, Caroline M. Sherman held the instrument which was the basis of the respondent's right. The warrant of attachment was not levied until August 6 thereafter.

The question is, therefore, whether the instrument executed to Caroline M. Sherman took effect on the decease of the intestate, either as a legal or equitable transfer of the estate which descended to the heir at law.

It is undoubtedly true that John L. D. Eycleshimer had no veeted interest in his father's estate at the time he executed the instrument, only a bare possibility, which, of course, was not the subject of a grant, nor did the instrument contain a warranty which could be made to operate as an estoppel; and it may, I think, be assumed in this case, that the instrument did not effect an absolute transfer of the legal title, and yet uphold the respondent's claim. If it was such an instrument as a

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court of equity would enforce on the decease of the ancestor, it was effectual for the respondent's purpose. That it was such, seems to me undeniable. The plain object which the parties had in view was to transfer the expectancy of an heir as a security for the payment of a just debt. In *Fonblanque's Equity* (218) it is said, that although a grant of a possibility is not good in law, yet it may be assigned; and Judge STORY lays it down (§ 1040) that even the naked possibility or expectancy of an heir to his ancestor's estate may become the subject of a contract of sale or settlement, and in such case, if made *bona fide* for valuable consideration, it will be enforced in equity after the death of the ancestor, not indeed as a trust attaching to the estate, but as a right of contract. So too it is laid down in *Spence's Equitable Jurisdiction*, that an expectancy or contingent interest may be sold, and the court of chancery, after the event has happened, will enforce the sale. Vol. 2, 865. It is true, Judge COWEN remarks, in *Munsell v. Lewis*, 4 *Hill*, 635, 642, that he was of the opinion that a simple expectancy, in which the assignor had no interest and which is unpurchaseable, can neither be assigned, nor would a contract for future assignment be valid; and so Judge WILLARD has said in general terms, that a bare possibility of an uncertain interest is not assignable. *Will. Eq. Jur.* 461. These remarks, however, without qualification, can hardly be deemed sound law at the present day, for in *Field v. Mayor, &c.* of N. Y., 6 *N. Y.* 179, it was held that an assignment for a valuable consideration, of demands, having at the time no actual existence, but which rest in expectancy merely, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence. The learned judge who gave expression to the views of this court, in that case, says: "There was indeed no present, actual potential existence of the thing to which the assignment or grant related, and therefore it could not and did not operate *eo instanti* to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did, nevertheless, create an equity which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished.

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On this principle an assignment of freight to be earned in future will be upheld and enforced against the party from whom it becomes due; and he adds, "whatever doubts may have existed heretofore on this subject, the better opinion I think now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold them. Authorities may be found which seem to incline the other way, but they will be found, on examination, to have been overruled or to have turned upon the question of public policy."

This decision by this court seems directly in point, and is conclusive of the case before us on this appeal.

- It may be well, perhaps, here to refer to the decision in *Milliman v. Neher*, 20 Barb. 37, and the cases there cited. It was there held that a chattel mortgage could only operate upon property in actual existence at the time of its execution. In that case the question arose in regard to the *legal title* to the property, and the decision should be construed with reference to that fact. Otherwise, the case is in conflict with numerous later decisions, where it has been held that such mortgage would be enforced in equity whenever the property should be obtained or should be brought into existence.

The instrument under which the respondent claims was evidently intended to be, and by its terms was, more than a mere power of attorney. It was intended to vest in Miss Sherman an interest in the property as a security for the payment of John L. D. Eycleshimer's debt to her. With other rights conferred on her thereby, she was to receive the proceeds and avails of the property "and of all my interest and estate therein, *and all my estate, property and effects aforesaid*, and apply the same respectively to the payment and discharge of the "debt which he therein declared he justly owed her. Now here was a clear appropriation by John L. D. E. of his expectation as heir at law in his father's estate, in effect a transfer thereof as security, equivalent in all essentials to a mortgage in exact and legal phrase.

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The instrument could undoubtedly have been enforced against John L. D. E., on his father's decease, according to its plain import and purpose. He could not have resisted its just effect as a claim or lien on the property. If not, it follows of course that his creditor could not acquire a superior right either by attachment or other proceeding. A creditor could only obtain his position and rights.

It is objected that the consideration of the instrument was a precedent debt, and consequently that Miss Sherman could not have insisted on her equity against the claims of an attaching and judgment creditor.

It is not suggested that the debt was not a just one, nor is it intimated that the instrument was not given in entire good faith. Regarding the instrument as an equitable security for the satisfaction of a just debt, the consideration was abundant and *bona fide*. This precise point was considered by Judge SELDEN in *Seymour v. Wilson*, 19 N. Y. 417, 421. The learned judge there shows that a transfer directly to a creditor in payment of or as security for an honest debt, in the absence of meditated fraud, is good against the claims of both existing and future creditors of the vendor. He says: "It is not necessary in such a case, that the vendee, in order to protect himself from a claim by the other creditors, should show any new consideration paid." He adds: "There is no doubt that the debt paid or secured by the transfer must, in such case, be regarded as a 'valuable consideration' within the section which saves the rights of *bona fide* purchasers; so that if the creditor acts in good faith, and for the mere purpose of obtaining satisfaction of his own debt in accepting the transfer, he will acquire a valid title. There being no equity prior to his own to be overcome, the necessity which calls for proof of a new consideration, in other cases, does not exist." The objection that the instrument is not supported by a valid consideration, is not well taken.

The case then comes to this: that Miss Sherman held, as security for the payment and satisfaction of a debt due her, a valid equitable claim on the estate of John L. D. Eycleshimer, which came to him by descent, on the decease of his father intestate, June 10, 1861, which claim then became a vested right

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in her, capable of equitable enforcement; and that the respondent on this appeal acquired her position and succeeded to her rights. The appellant's proceedings and judgment were subsequent thereto, the warrant of attachment having been levied on August 6, 1861, and the judgment entered in October following. The claim of the respondent to the fund in controversy was therefore paramount to that of the appellant, and the judgment of the supreme court to that effect should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

STRINGHAM v. ST. NICHOLAS INSURANCE COMPANY.

March, 1867.

An agent of an insurance company, authorized to receive applications and make them temporarily binding, pending the consideration of the risk, and to receive premiums on renewals, has not implied authority to consent to an assignment of a policy.*

Authority to give such consent is not to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made, although the person applying for the consent to the assignment may have supposed that such agent had authority to grant such consent.

An agent cannot create an authority in himself to do a particular act, by its performance, or by asserting his authority to do it. To bind the principal, the agency must be established, and one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge, must be proved.

Joseph Stringham sued defendants, in the supreme court, on a policy of fire insurance issued by them to one L. Austin

* Compare *Ellis v. Albany City Ins. Co.*, 50 *N. Y.* 402; affirming 4 *Lana*, 433; *Carroll v. Charter Oak Ins. Co.*, vol. 1 of this series, p. 816, and note.

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Spaulding on July 12, 1856, for three thousand dollars, upon a stone flouring mill and machinery therein; and on payment by Spaulding, June 30, 1857, renewed for one year from July 12, 1857, to July 12, 1858. On August 25, 1857, Spaulding assigned the policy and all his interest therein to U. H. Wolfe, and on October 5, 1857, Wolfe assigned the same to plaintiff. The property was totally consumed by fire on November 15, 1857.

The policy contained this clause: "The interest of the assured in this policy is not assignable unless by consent of this corporation manifested in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

Upon the back of said policy were printed two blank consents, as follows: "The St. Nicholas Insurance Company of the city of New York hereby consent that the interest of _____ in the within policy be assigned to _____, subject, nevertheless, to the conditions therein contained.

" ————, *Secretary.*"

These consents were filled up and signed, previous to the execution of said assignments, respectively, on August 25 and October 5, 1857, so as to read as follows: "The St. Nicholas Insurance Company of the city of New York, hereby consent that the interest of L. A. Spaulding in the within policy be assigned to U. H. Wolfe, subject, nevertheless, to the conditions therein contained.

" H. A. BREWSTER, *Agent.*"

The second consent was in all respects similar, except that the name of U. H. Wolfe appeared in place of L. A. Spaulding's, and that of Joseph Stringham in the place of U. H. Wolfe's. The word "secretary" in each of said consents was erased, and the word "agent" written in its place.

The defense was, that the company had never given its consent to these assignments.

The referee sustained the defense, holding that Brewster, as agent, was unauthorized to consent; and gave judgment for defendants.

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The supreme court, upon substantially the same grounds as those assigned in the opinion of this court, affirmed the judgment. The plaintiff appealed.

W. Dorsheimer, for plaintiff, appellant.

J. C. Dimmick, for defendants, respondents;—Cited *Smith v. Saratoga County Mutual Fire Ins. Co.*, 1 *Hill*, 497; *S. C.*, 3 *Id.* 508; *Wilson v. Genesee Mutual Ins. Co.*, 14 *N. Y.* (4 *Kern.*) 418; *Lightbody v. North America Ins. Co.*, 23 *Wend.* 22; *Amory v. Hamilton*, 17 *Mass.* 109; *Perkins v. Washington Ins. Co.*, 3 *Cow.* 645; *Seymour v. Wyckoff*, 10 *N. Y.* (6 *Seld.*) 224; *Nixon v. Palmer*, 8 *N. Y.* (4 *Seld.*) 398; *Roach v. Coe*, 1 *E. D. Smith*, 175.

DAVIES, Ch. J. [After stating the facts.]—The only question seriously controverted upon the trial was, whether Brewster had authority to assent, on behalf of the company, to the assignments by Spaulding and Wolfe.

The plaintiff sought to establish such authority upon the grounds:

1. That Brewster had, on September 5, 1857, notified the defendants that Spaulding's interest in the policy had been assigned to Wolfe, and that the company had by silence ratified the same.

2. That Brewster, as agent of the defendants, had authority to grant the assent of the company to those assignments.

The first position was sought to be established by the testimony of Brewster.

[We omit here that part of the opinion which discusses the first of these two grounds, and which is occupied with the credibility of certain testimony, without bearing on the principles of law.]

It is now contended, however, that Brewster, as agent of the defendants, had authority to grant the assent of the company to these assignments. It is very apparent from the testimony and the correspondence between Brewster and the company what his powers were.

1. He had authority to receive applications for insurance, and make them binding upon the company for the period of

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ten days. At the expiration of that time, if the company did not assume the risk, it terminated.

2. He had power to receive the premiums on renewals of policies, and transmit the same to the company, and if accepted by them, on the receipt by him of the renewed certificate, signed by the officers of the company, to deliver the same to the assured.

His duties seem to have been confined almost exclusively, if not entirely, to these two matters. I do not attach any importance to the statement made by Brewster, that his impression is that he executed other permissions to assign policies; he says, "It is an impression; I cannot state positively if such were executed, and I cannot say that they were"—for the reason already suggested, and for the additional one, that the statement is very vague and indefinite. If he had been in the practice of granting such consents, he could easily have ascertained the fact and mentioned the instances. The isolated case referred to in defendants' letter of February 13, 1856, wherein they state, "We have also noted the assignment of 8705, as requested," is too indefinite and uncertain to show that the agent had a general authority to give similar consents in other cases.

But the language of the policy, and the blank consent printed on the back thereof, unmistakably indicate the steps to be taken by a policy holder, when a consent to an assignment was desired, and the officer or agent only authorized to give the consent to assignments. As already observed, the policy carried on its face notice to all holders, that the interest of the assured was not assignable, unless by consent of the corporation manifested in writing, and the printed blanks on the back of the policy were like notice of the form of such consent, and the officer alone authorized to give it, and manifest the assent of the company. It was full notice to all that it must be done by its secretary, and the erasure by Brewster of the word "secretary," and writing in place thereof the word "agent," was an admonition to the parties that the authority to give the consent was in the secretary only. It is doubtless true that the person applying to Brewster for these consents may have supposed that he had authority to grant them, or if

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not, that his acts would be ratified by the defendants. But Brewster could not create an authority in himself to do the particular act, by its performance, or asserting his authority to do it. To bind his principal, his character as agent must be established and of so general a nature as to give him authority to do the act in question, or subsequent ratification, with full knowledge, must be established. The proof in this case falls far short of making out either of these propositions. It was sought to bring home to the defendants knowledge of these assignments, by showing that Brewster had entered in books kept by him at Rochester, the fact that he had given the consent to these assignments. To make the contents of these books notice to the defendants, it was proven that the defendants, on the application of Brewster, had paid one of them a small sum, and that said book was kept in the office of said Brewster, and was lettered on the back, "St. Nicholas Insurance Company, Policy Register, Rochester Agency, 1855."

The person who procured said consents testified, that on both occasions of procuring the same, "I saw said Policy Register, and that Brewster entered in said Policy Register, the fact of such permission and assignment, and its date," and that said person saw on these occasions each of said entries made. There was no evidence offered that the defendants, or any of their officers ever saw said book, or had any knowledge of its contents; and it affirmatively appeared that all the knowledge they or any of them had in relation to said book, was derived from a letter written by said Brewster to the secretary of the defendants, under date of "Rochester, August 6, 1855," in which he says: "We find it to be very necessary, as we advance in our business for you, that we should have a Policy Register for our own use. The companies we represent have generally preferred the purchase of a book here, and we charge it to them, though some prefer to send us books. Those we have cost us \$3.50, and are expressly got up for us of a uniform kind. Can we order one for you?" To this letter the secretary of the defendants replied, under date of August 9, 1855: "Yours of the 6th instant is received. You are at liberty to purchase the necessary books on behalf of this company for the transaction of its business in your city."

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The counsel for the plaintiff then turned to page 40 of said book, where the policy in suit is registered, and pointed out therein, against the description of the subject of insurance, the following entries in red ink :

“Assigned August 27, 1857, to U. H. Wolfe.

“October, 8, 1857, to Joseph Stringham, Buffalo.”

Defendants' counsel objected to the reading of either of said entries in evidence from said book, and the referee sustained the objection, and excluded the evidence, and the plaintiff's counsel then and there duly excepted to such decision. It certainly cannot be successfully maintained, that the circumstance that the defendants paid or consented to pay for the cost of this register for Brewster's own use, changed in any respect relations then existing between Brewster and the defendants. It is not suggested that the defendants, or any of their officers, ever saw the said register, or were at any time made acquainted with its contents, or the lettering upon it, or the particular purposes to which it was applied. It did not constitute Brewster the clerk of the defendants, or bind them by the entries he or his clerks made therein. Those entries were irrelevant to prove the fact that Brewster was the agent of the defendants to give their consents. That must be established by evidence *aliunde* his acts or declarations.

Neither the declarations of a man, nor his acts, can be given in evidence to prove that he is the agent of another, or the extent of his powers. *Scott v. Crane*, 1 *Conn.* 255; *Plumsted v. Rudebagh*, 1 *Yeates*, 502, 505; *James v. Stookey*, 1 *Wash. C.* 330.

Brewster testified that his agency for the defendants commenced upon the receipt of the letter from the secretary of the defendants of April 13, 1855, and he produced the letter, and it was read in evidence. There was no proof that any other or greater powers were ever conferred upon him. It was in reply to a letter from Brewster, in which he says, “I should be glad to send your company risks, and can send you a good line at good rates.” The defendants' secretary said : “Your views with regard to a local agent to attend to the interests of our company in your city are correct. Should you feel dis-

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but we declined, as we had not given such authority to agents."

It is then apparent that the powers of Brewster as agent were restricted to the receipt and forwarding to defendants of applications for insurance, and authority to make a policy for only ten days; and the certificates which were exhibited to the customers generally, contained information of the character and extent of the powers of the agent. The declarations and acts of Brewster within the scope of his agency, if they had been admitted, would not be of any materiality. The declarations and representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. *New York Life Ins. & Trust Co. v. Beebe*, 7 N. Y. (3 Seld.) 364; *Olding v. Smith*, 11 Eng. L. & Eq. 424; *Very v. Levy*, 13 How. U. S. 345.

In the case in 3 Seld. (*supra*), Schermerhorn, the agent, swore that he was the agent of the respondents in procuring a loan for them from the appellants, and it was contended, on the part of the appellants, that respondents were concluded by his acts and representations, the same as if they were their own, upon the principle which pervades all cases of agency—that the principal is bound by all acts of his agent within the scope of his agency, which he holds him out to the world to possess, and that where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject matter will also bind him, if made at the same time, and constituting part of the *res gesta*. The court say: "The declarations or representations of the agent, when not expressly authorized by the principal, must, in order to bind him, be within the scope of his agency. But that was not the case here. Schermerhorn's agency was to obtain a loan for the respondents from the appellants. His alleged declarations, which are relied upon, are entirely without the scope of such or any other agency." In that case, there was no evidence to show that the respondents knew of the alleged representations of Schermerhorn, or that they ever authorized him to make them. So in the case at bar there is no evidence that these defendants ever authorized Brewster to give the consents to the two assignments mentioned, or that they ever

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knew that he had given such consents, until after the happening of the loss under the policy. We have seen what were the actual powers conferred by the defendants upon Brewster, and what was the scope of his agency.

Not only was the power to give the consents in question not within the scope of that agency, but the policy itself, and the blank consents indorsed thereon, gave notice to all holders of such policies that an agent of the company had no such power.

In view of all these considerations, the referee properly excluded the books kept by Brewster, and the entries therein. They were illegitimate to enlarge, alter, or modify his power as agent.

The judgment of the supreme court affirming the judgment upon the report of the referee was correct, and should be affirmed, with costs.

PARKER, J.—The question litigated in this action is, whether H. A. Brewster was the agent of the defendants, and as such authorized to give their consent to the assignments of the policy, through which the plaintiff claims it.

The referee nonsuited the plaintiff, on the ground that he had failed to show that the defendants had consented as required by the policy, to the assignment of it, or that Brewster had any authority to give such consent.

It is very clear, I think, that Brewster had, in fact, no such authority. But it is insisted by the plaintiff's counsel, that the company dealt with Brewster in such a manner that he was justified in holding himself out to the public as the general agent; that he did represent himself to the plaintiff as such agent, and therefore that the company is bound by his acts in signing the consent to the assignments.

It is not contended that the plaintiff was induced to accept the consent of Brewster as that of the company, by any act of the company, implying or recognizing the authority of Brewster to give it, which came to the knowledge of the plaintiff, but that the acts of the company justified Brewster in assuming authority to give the consent, and therefore they are bound by it.

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This is but stating, in another form, that Brewster was in fact the agent of the company, which proposition, as already intimated, I do not regard as sustained by the evidence.

Neither do I see anything in the evidence warranting the statement that the defendants had an office in Rochester, in charge of which Brewster was acting as clerk. The fact that he was authorized by the company, at his request, to purchase at their expense a policy register, in which to keep an account of the business which he should do for the company, comes far short of establishing the fact claimed for it.

I think the nonsuit was properly upheld by the general term, and its judgment should be affirmed.

All the judges concurred, except HUNT, J., not voting.

Jungment affirmed, with costs.

STROUD v. TILTON.

September, 1866.

Witnesses are competent to prove the general correctness of plaintiff's day book who have settled their accounts by his ledger, which was posted from the day book.

Books of account are admissible in evidence though the items contained in them were noted on a slate in the first instance, if such items were transcribed on the books from day to day in the usual course of business.*

The right of a party to use his books as evidence is not abrogated by the statute authorizing him to testify as a witness in his own behalf.

William Stroud sued David Tilton, in the supreme court, to recover, among other things, a balance for work and materials. Plaintiff was an iron-founder and machinist; and the work was the making and repairing of guns.

On the trial, plaintiff, who kept regular books of account, the correctness of which he proved by those who had dealt and settled with him by them, offered his books in evidence. The method of keeping the books was shown to be as follows :

* See Dewey v. Hotchkiss, 40 N. Y. 497.

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the entries in question were in the handwriting of plaintiff's son, his book-keeper, who died before the trial. The work done was entered each day, on a slate, by those doing it, or those under whose eye it was done, in the shop and the foundry respectively; the book-keeper entered these charges from day to day in the books and effaced them from the slate.

Plaintiff testified that the books contained his account with defendant; that he believed the entries to be correct; that the items in question were correctly and fairly entered as to price, hours and materials; that he knew the details when the charges were made but could not remember them now without the books.

It appeared also that the prices were reasonable, the work and materials of the best quality, and one gun was delivered to defendant, with which he expressed his entire satisfaction, and the work on the other gun was continued until he stopped it. The only question made in this court was on the admissibility of the books.

Richard M. Harrington, for defendant, appellant.

Edwin T. Rice, for plaintiff, respondent;—Cited *Brewster v. Doane*, 2 *Hill*, 537; *Halliday v. Martinet*, 20 *Johns*. 168; *Pritt v. Fairclough*, 3 *Campb.* 305; *Pitman v. Maddox*, 2 *Salk.* 690; *Vosburgh v. Thayer*, 12 *Johns.* 461.

BY THE COURT.—PORTER, J.—The books of the plaintiff were properly received in evidence. It was proved that the entries were made in the usual course of business, and that the clerk who made them was dead. The general correctness of the books was shown by those who had dealt with the plaintiff; and the accuracy of the charges in question was verified by his own oath. Part of the property had been delivered to the defendant, and the entire work was done under the supervision of his agent. No further proof was necessary to justify the introduction of the books. *Merrill v. Ithaca & Oswego R. R. Co.*, 16 *Wend.* 586, 694; *Brewster v. Doane*, 2 *Hill*, 537.

There is no force in the objection that the witnesses who proved the correctness of the books settled their accounts by

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the ledger, without examination of the original entries. If the charges as posted and paid were honest, it is to be presumed that they were correct as entered in the day-books.

It appeared that the items of the plaintiff's account were noted, in the first instance, on slates in the various workrooms; but this constitutes no objection, as they were transcribed on the books from day to day in the usual course of business. *Sickles v. Mather*, 20 *Wend.* 72; *Davison v. Powell*, 16 *How. Pr.* 467.

The statute authorizing parties to testify in their own behalf has not deprived them of the right to introduce their books of account in evidence. *Tomlinson v. Borst*, 30 *Barb.* 42.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

SUDLOW v. KNOX.

June, 1869.

An order punishing a party to an action as for contempt, by imposing a fine for the indemnity of the adverse party injured by his refusal to obey the order of the court, and by imprisonment to compel obedience, is appealable to this court.

Such an order is not a proceeding in the action, within the meaning of subd. 2 of § 11 of the Code of Procedure,—which allows appeals from “an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken,” &c.,—but is a final order affecting a substantial right, made in a special proceeding,” within the meaning of subd. 3.*

Such an order will not be reversed by this court merely because it does not affirmatively appear from the appeal papers that proof of the misconduct was made by affidavit, and due notice given.

It is not a contempt for a party, required to produce his books before a referee, to refuse to leave the books with the referee, if the order under which the referee acts only requires the production of the books.

* See *Brinkley v. Brinkley*, 47 *N. Y.* 40.

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Whether it is competent for the court to order the books of a party to be left with the referee for the purpose of an accounting,—*query?*

It is a contempt for such party to refuse to obey the referee's order that he allow a witness, while testifying, to examine the books, to enable the adverse party to question him thereon.

In proceedings as for contempts to enforce civil remedies, under 2 R. S. 534-538,—section 21 of which authorizes the court to impose a fine to indemnify a party for actual loss and injury, and to satisfy his costs and expenses,—the costs and expenses must be ascertained by the rate of compensation fixed by statute for the services performed.

The amount of the fine to indemnify for the other loss and injury, must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for such damages.

The court cannot for either purpose summarily fix a gross sum in its discretion.

Thomas R. Sudlow, receiver, sued George and James Knox, in the supreme court, alleging that in supplementary proceedings upon a judgment recovered by one Ogden against Henry Knox and another, plaintiff had been appointed receiver of Henry Knox's property; that Henry Knox had been a partner in the firm of George & James Knox, and had an interest in the property of that firm, which the present action was brought to reach and apply to the satisfaction of that judgment.

After trial the court ordered that it be referred to a referee to take and state an account of the partnership affairs; and for this purpose required defendants "to produce before said referee, under oath, all papers, deeds and writings in their custody respectively, or under their control, relating thereto; and to be examined, together with any witnesses produced by any of said parties under oath or upon interrogatories, as said referee shall direct," &c.

The referee certified to the court these facts: The attorney of George Knox appeared before the referee, after defendants were ordered to produce their books, and produced certain books of the firm, alleged to be all their books; the referee directed the attorney to leave the books with him, he not then having time or opportunity to examine them; but the attorney refused to do so, and a similar refusal was made by George

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Knox on subsequent days, when, pursuant to adjournment, the examination was continued.

On examination of the books, it appeared that some leaves had been removed.

Ogden, the plaintiff in the supplementary proceedings, was called as a witness, and the referee directed the defendant, George Knox, to produce the ledger for him to examine, that he might answer questions as to the transactions appearing there. This, the defendant refused to do, resisting the demand by force; but he offered to place the book in the hands of the referee for his own examination, but not for that of the witness and creditor. Defendants offered to produce the books from time to time before the referee, as he might direct, or to allow him to examine them and make extracts at the defendants' place of business, but absolutely refused to leave them with him in his office.

The referee certified that it was impossible for him to make any intelligible examination of the books during an ordinary hearing, or without a book-keeper's aid, and without their being left with him at his leisure.

An attachment having been issued against George Knox, interrogatories were filed and answered, and thereafter the supreme court, at special term, made an order reciting the issue of the attachment for contempt for not producing the books, papers and documents of the firm of G. & S. Knox & Co. before the referee, as required by order of court, and not leaving the books, papers and documents with said referee, pursuant to such order, and for not allowing the same to be examined by said referee, and by a witness sworn by him for that purpose, and resisting such examination by force, and for removing the same from the office of said referee contrary to and in defiance of the decisions of the referee, and for producing only portions of the books, and those in a mutilated condition; and reciting the filing of answers to the interrogatories; and thereupon adjudging George Knox guilty of the contempt and misconduct charged, and that it prejudiced the plaintiff's rights, and imposing a fine of two hundred dollars for the misconduct, and one thousand dollars to be paid to plaintiff for the costs and expenses of the proceedings for such

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misconduct, and ordering defendant to be committed until he produce such books, &c., and leave them with the referee.

On defendants' appeal to the general term, the amount of the fine for expenses was reduced from one thousand dollars to two hundred and fifty dollars, and the order in other respects affirmed.

Defendants appealed.

The proceedings were entitled in the action of Sudlow against Knox.

The papers on appeal contained an order of court made January 18, 1866, reciting the "reading and filing affidavit and report of referee, and notice of motion," but without indicating their contents, and ordering the defendant George Knox to produce before the referee, to be used and examined on the accounting, and from time to time as the referee might require, all the books, &c., referred to in the order of reference; and that in case he should fail to produce them that an attachment issue; together with proof of personal service thereof on Knox

Also, a certificate of the referee, dated March 10, the contents of which are above stated.

Also, notice of motion, founded thereon and on the other papers, that an attachment issue.

Also, an order made on such motion March 24, 1866, reciting that it had appeared to the court that Knox was in contempt, &c. (but not indicating what evidence was produced), and that a writ of attachment had been issued, and that Knox was now personally before the court on such attachment,—and ordering interrogatories to be filed and answered.

Also, the interrogatories and answers filed.

Also, an order of court, dated April 9, 1866, reciting the issue of the attachment, its return, and the personal appearance of Knox, and filing of interrogatories and answers, and declaring that upon the testimony and answers of Knox, it appeared he had committed the contempt,—and adjudging him guilty and imposing the punishment above stated.

These constituted all the papers presented on the appeal, containing any proof of the facts or notice of the proceedings.

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George W. Stevens, for defendant, appellant.

H. F. Hatch, for plaintiff, respondent.

BY THE COURT.—GROVER, J.—The counsel for the respondent insists that the order is not appealable to this court, and that the appeal should for this reason be dismissed.

If the proceedings are to be regarded as taken in the action of *Sudlow v. Knox*, the counsel is right in the position. The order would then belong to the class specified in Code of Procedure, section 11, subdivision 2, and clearly not be appealable, as it does not determine that action, or prevent a judgment from which an appeal might be taken. If the order is one not made in the action, but in a special proceeding instituted to redress an injury sustained by the plaintiff, caused by the violation of the order made in the action, requiring the appellant to produce his books, &c., before the referee, it comes within subdivision 3, and is appealable to this court, as a final order made in a special proceeding affecting a substantial right.

I think the order belongs to the latter class. It in no way involves the merits, or affects the judgment to be rendered in the action. It could not, therefore, be reviewed upon an appeal from the judgment to be rendered therein. § 11, subd. 1. Unless regarded as made in a special proceeding, it is in no way reviewable by this court. This is not conclusive, for the statute does not make all final orders made by the supreme court appealable to this court. It is necessary to examine the nature of the proceedings resulting in the order appealed from.

These were instituted and conducted under the provisions of statute entitled of proceedings as for contempt, to enforce civil remedies and to protect the rights of parties in civil actions. 2 R. S. 534, § 1, specifies the cases in which the power given may be exercised by the court. An examination of these will show that the larger portion, if not all, can in no sense be regarded as proceedings in the action. Many are cases in which those proceeded against are not parties to the action.

Another class may be taken after the action is terminated, either by settlement or final judgment, and in none of the

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cases can the proceedings have any effect in the action or upon the judgment, other than a tendency to protect the party from injury from the future misconduct of the person proceeded against. By section 2 it is provided that if the misconduct occurs in the presence of the court, it may be punished summarily, as prescribed in the act. Section 3, and subsequent sections, provide for the proceedings to be taken in cases where the misconduct charged does not occur in the presence of the court. None of these proceedings, whether against parties or others, in any way affect the action or judgment.

The precedents prior to the Code show that the proceedings subsequent to the attachment were not entitled in the action, but were entitled,—“The People” against the person charged.

Section 21 provides that in case the fine imposed for the indemnity of the party injured shall be paid to and accepted by him, it shall constitute a bar to any action brought to recover damages for such injury or loss. This shows clearly that the legislature did not regard the proceedings as had in the action, because, if so regarded, the imposition of the fine would itself constitute a bar to any other proceeding to obtain satisfaction for the injury, and the institution and pendency of the proceedings would abate any other proceedings commenced for the same cause.

It follows that the order is appealable.

The counsel for the appellant insists that the order is erroneous, for the reason that the misconduct alleged was not proved by affidavit, as required, and that the requisite notice was not served.

The answer to this is, that it does not appear from the case that such proof was not given and notice served. From the case, I am unable to discover any such failure to comply with the statute as to show that the court had not jurisdiction, or as to deprive the appellant of a free opportunity to answer the charge, and interpose his defense, if any he had, thereto.

This brings us to the merits.

The order, in specifying the misconduct of which the accused was convicted, recites, among other things, that he refused to leave his books with the referee. This he was not required to do by the previous order, and his refusal was, there-

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fore, no contempt. Whether an order requiring him to leave them would be valid, it is not now necessary to determine.

The order further recites that he produced the books in a mutilated condition. The uncontradicted testimony of the accused exonerated him from this portion of the charge, and for aught I can see, he was entitled to an acquittal thereon.

But the order further recites that the accused refused to obey the order of the referee, requiring him to permit a witness, while giving his testimony, to examine the books, to enable the opposite party to examine such witness in relation thereto. The evidence proved this portion of the charge. This constituted misconduct and a contempt within the meaning of the statute. The accused was, therefore, properly convicted of this part of the charge.

The order of the special term requires the accused to pay to the respondent his costs and expenses of the proceedings against the accused, and fixes the amount of such costs and expenses at the sum of one thousand dollars. This was modified by the general term, by reducing the amount to be paid to the respondent for his costs and expenses, to two hundred and fifty dollars.

This provision of the order is based upon section 2 of the statute. That section provides that if an actual loss or injury shall have been produced to any party by the misconduct alleged, a fine shall be imposed sufficient to indemnify such party, and to satisfy his costs and expenses, which shall be paid over to him upon the order of the court. The question is, whether the amount of the costs and expenses is to be ascertained by the rates of compensation prescribed by statute for the services performed. or whether the court is summarily to fix the amount in its discretion.

The present case shows that this is a very important question. The judge at special term, acting upon the latter principle, fixed the amount at one thousand dollars; while the judges at general term, acting upon the same principle, were of opinion that twenty-five per cent. of that amount was an adequate compensation. This wide difference between learned judges shows that their discretion, exercised in the absence of any testimony or fixed rule, is not infallible, and that it is not

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quite safe to invest them with an unlimited power to transfer the money of one to another in such amounts as they deem proper.

Nevertheless, if this power has been clearly given by statute, it must be upheld, as there is no constitutional restriction upon the power of the legislature to provide for the punishment of contempts in this way. But such an intention ought not to be imputed to the legislature, unless plainly expressed in the statute. No such language is found in section 21. Nor can any such design be fairly deduced therefrom. The costs and expenses specified therein were the costs and expenses allowed by the fee bill for the services performed. This construction was uniformly adopted in respect to all statutes giving costs to a party, prior to the Code. This construction was put upon the statute in question in *People v. Nevins*, 1 *Hill*, 154, and by the chancellor in *Albany City Bank v. Schemerhorn*, 9 *Paige*, 372. There was no intimation in these cases of any power in the court to award any discretionary sum for costs and expenses, or any sum except what was provided in the fee bill.

It follows that there is no power conferred upon the court by this section to make discretionary allowances for costs and expenses in these proceedings. If such power exists, it must be found in some other statute. The learned counsel for the respondent has not cited any such statute, nor have I been able to find any. It follows that the special term erred in determining the amount to be paid to the respondent for his costs and expenses of the proceedings, without any reference to the statute fixing the compensation for the services performed, and that this error was not remedied by the general term, for, although the amount was largely reduced by the latter, yet, in arriving at it, the general term proceeded upon the same principle as the special term, determining the amount in the exercise of discretion, without any reference to any amount prescribed by statute for the services rendered.

I shall not examine or determine whether the compensation is to be governed by the allowances provided by the Revised Statutes or the Code, as that question was not considered by the supreme court, nor discussed by counsel in this court. However this may be, no allowance can be made for costs and expenses, except such as the statute authorizes.

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The order does not expressly state that the fine imposed upon the appellant, in addition to that for costs and expenses, was to be paid to the respondent in satisfaction for the injury sustained by him from the misconduct of the appellant. That it was designed for that purpose, and, if sustained, will be so disposed of, I think apparent from the papers. Assuming this to be the fact, the special term erred in arriving at the amount. This was fixed by the judge, without any proof whatever tending to show the amount of damages sustained. The judge adopted and fixed such amount as he deemed proper, in like manner as in the imposition of a fine upon conviction for an offense, where the punishment prescribed by statute is a fine, the amount of which is to be fixed by the judge within the limits prescribed by statute. In this class of cases the discretion of the judge, in view of the circumstances, fixes the amount of the fine. Not so in proceedings under the statute in question. In the latter, the accused is to be fined such a sum as will compensate for the damages sustained by the party from the misconduct. These damages must be ascertained by the like evidence, to which are to be applied the same rules of law, as upon the trial of an action brought for the injury. The amount is no more discretionary in proceedings under the statute as for contempt, to procure redress, than in an action brought for that purpose.

The order appealed from must be reversed, and the proceedings remitted to the supreme court for further proceedings in that court.

A majority of the judges concurred in holding the order appealable; and in reversal on the above grounds.

All concurred in the opinion that the witness was in contempt for not producing the books.

All concurred in the opinion that he was not in contempt for not leaving the books with the referee, except LOTT, J., who expressed no opinion on that point.

Order reversed, with costs, and proceedings remitted in conformity with the opinion.

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September, 1865.

Under L. 1842, 149, c. 135, § 32, the committee of an insane convict, provided they have received sufficient funds, may be compelled to bear the expenses of his maintenance, clothing, &c., while in the State lunatic asylum.

An action to recover back such expenses may be maintained against the committee, by the county from which he was sent, and which has advanced the money for his support.

A person convicted of murder, before sentence was passed, was found to be insane, discharged from imprisonment, and sent to the State lunatic asylum; his expenses there were paid by the treasurer of the county from which he was sent. *Held*, that the supervisors of the county could recover from the committee of the criminal's estate the amount so advanced, it being proved that such committee held property of the criminal more than sufficient for the purpose.

The plaintiffs sued Leroy Morgan and others, committee of Alfred Tyler, a lunatic, in the supreme court, for money paid by the treasurer of the county for the clothing and maintenance of the lunatic while an inmate of the State lunatic asylum.

The complaint alleged that Tyler was tried and convicted at the oyer and terminer, in 1855, of murder. In May, while yet in prison and before sentence, the county judge, pursuant to the State lunatic asylum act, examined his mental condition and having ascertained him to be insane, ordered him discharged from imprisonment and to be put in the State asylum at Utica until restored to his right mind, on which event the superintendent of the asylum was to inform the judge, county clerk and district attorney, so that he might be remanded.

That Tyler was accordingly confined in the asylum, and the county treasurer had paid the asylum treasurer the expenses plaintiff now sought to recover. It was also alleged that defendants had been duly appointed committee of Tyler's estate, and as such had property more than sufficient to reimburse the county; also, that the court had given leave to sue.

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Defendants demurred, and relied upon the general provisions of law by which expense of maintaining prisoners in jail for criminal offenses, whether before or after conviction, is a county charge.

Plaintiffs insisted that Tyler when in the asylum was no longer "in prison" within the law, but that his estate was liable for his support, upon a fair construction of the State asylum act. The provisions of the statutes are fully stated in the opinions.

The supreme court at general term held that the right of the plaintiff to recover was to be decided entirely upon the construction of the act (L. 1842, c. 135) under which the lunatic was sent to the asylum, and that no aid could be derived by reference to other acts since. There were no other acts in *pari materis*, because the act creating the State lunatic asylum was designed to create a system complete in itself. That the intent of the legislature, as shown by sections 31, 32 and 36 of that act (the whole of the last clause of section 31, with its qualifications and modifications, being by reference incorporated into sections 32 and 33) was that the support of a patient at the State lunatic asylum should be charged, 1, upon the estate of the patient; 2, upon his relatives who would be liable for his support under other circumstances; 3, upon the town or county that would otherwise be liable. That, therefore, the action was well brought.

Defendants appealed.

Morgan & Middleton, for defendants, appellants.

N. B. Smith, for plaintiffs, respondents.

DENIO, Ch. J. [After stating the pleadings above.]—The defendant's counsel relies, in support of the demurrer, upon the general provisions of law by which the expense of maintaining prisoners in jail for criminal offenses, whether before trial or after conviction, is a charge upon the county. The plaintiffs, on the other hand, insist that Tyler after his removal to the asylum was no longer in prison within the meaning of

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these provisions, but that his estate, in the hands of his committee, is liable for his support, according to the effect and fair meaning of the statute to organize the State asylum.

Section 31 of the act (*L. 1842, c. 135*) declares that persons who have escaped indictment or been acquitted of criminal charges on trial, on the ground of insanity, shall, after careful inquiry by the court and the ascertainment of the fact, be ordered into safe custody and be sent to the asylum. It further provides that the county from which such a person is sent shall defray all his expenses while there, and of sending him back, if returned, and concludes as follows: "But the county may recover the amount so paid from his own estate, if he have any, or from any relative, town, city or county that would have been bound to provide for and maintain him elsewhere." The next section (section 32) declares that if any person in confinement under certain circumstances mentioned, including those "under a criminal charge . . . or under any other than civil process," shall appear to be insane, the first judge of the county shall institute a careful investigation, aided by the testimony of physicians and others; and that if, after an invitation to the district attorney, and by a jury if thought necessary, he be satisfactorily proved to be insane, the judge is to discharge him from imprisonment "and order his safe custody and removal to the asylum, where he shall remain until restored to his right mind;" when, if the judge has so directed, information is to be given by the superintendent to the judge, the county clerk and the district attorney, so that he may be remanded to prison, and criminal proceedings may be resumed or he be discharged.

The section concludes as follows: "The provisions of the last preceding section requiring the county to defray the expenses of a patient sent to the asylum, shall be equally applicable to similar expenses arising under this section and the one next following." Section 33, which is next in order, contains a similar provision as to persons imprisoned on civil process, attachment, or for non-payment of militia fine, and who shall become insane. A similar inquiry is to be made, and if insanity is found, the person is to be discharged from imprisonment and ordered into safe custody and sent to the asylum;

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"nevertheless," it is added, "the creditor may renew his process, and arrest again his debtor when of sound mind."

It is conceded that the estate of the insane person is liable for his maintenance at the asylum in cases within section 31 such being the express language of the law; but it is argued that the words of reference in section 32, which embrace the case of Tyler, only incorporate the portion of the provisions which charge the county with the expenses, and not the part providing for a reimbursement from the estate, &c., of the person supported. The language is not perfectly explicit, and a verbal interpretation may support the defendant's position. But I am of the opinion that the intention was to incorporate the whole of the provisions respecting the expenses at the asylum contained in section 31 into section 32, as well that one which furnishes the indemnity, as that which charges the county. The word *provisions* is put in a plural form, though the language imposing the charge in the first instance on the county is a single provision. In a general way it may be said that "the provisions of the last preceding section, requiring the county to defray the expenses of a patient sent to the asylum," are those which require the county to advance the amount in the first instance, and to be indemnified for the advance out of the estate of the patient, if he have any, and from the other sources indicated if he have none. The circumstance that the cases embraced in section 33 are placed in the same category with those in section 32, adds force to this construction. These are cases of imprisonment in civil suits, where the public were never bound to support the person imprisoned, even when in jail. It would be strange if he should be required to be maintained at the public expense in an asylum when he happened to become insane, though he had property to maintain himself.

This construction is further supported by section 36, which is a general provision, embracing the expenses of every insane person supported in the asylum, without regard to the manner in which he was sent there, declaring that such person shall be personally liable for these expenses. In terms it completely covers the case of Tyler. If it can be taken out of that provision, it must be on the ground that there is something in the

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fact that he had been an offender against the laws before he became insane, which should exempt his property from the burden of his support. But surely we cannot impute any such policy to the legislature.

The case of *People v. Supervisors of Genesee*, 7 *Hill*, 171, has no application to this case. That was an attempt to charge a town in Genesee county with money paid by that county for the support of a person sent to the asylum; but as that person was not a pauper but a person in indigent circumstances only, it was held that the town was not liable for her support under any other circumstances, and as the act relating to the asylum did not give the county a remedy against the town in such cases, the proceeding by the county to charge the town was not sustained.

I am in favor of affirming the judgment.

POTTER, J.—In 1842 an act of the legislature was passed entitled “An act to organize the State lunatic asylum, and more effectually to provide for the care, maintenance and recovery of the insane.” *L. 1842, c. 135*. This act, containing fifty-one sections, provided a general system in regard to all the insane to be cared and provided for at the State institution. At the time of the passage of this act, there was in force, by virtue of title three, chapter twenty, part one of the Revised Statutes (1 *R. S.* 634), an act entitled “Of the safe keeping and care of lunatics,” containing certain other provisions in regard to that class of persons. There was also in force at the same time, by virtue of article ten, title two, chapter five, part two of the Revised Statutes (2 *R. S.* 52), an act entitled, “Of the custody and disposition of the estates of idiots, lunatics, persons of unsound mind and drunkards,” containing certain other provisions in regard to the same class of persons. These three statutes above referred to contain substantially all the statute provisions on the subject of lunatics, and all that are necessary to refer to in the examination of this case, except that such prior statutes also refer to the statutes in relation to the support of the poor, for the remedies and manner of enforcing their provisions, and to which last mentioned statutes, therefore, it may also be necessary to refer in this review. The act of 1842, in some of its sections, plainly refers to such

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existing laws; they are all, therefore, to be regarded as being "in *pari materia*." In this respect I differ from the opinion of the Supreme Court.

[The learned judge here recapitulated the allegations of the complaint and continued:] The question of liability at law is the only one in the case. If the liability exists it is doubtless created by statute. To determine this question several sections of the statute of 1842, upon which this liability depends, must be read in connection with each other, and with other statutes to which they refer.

Section 31 of the act of 1842 provides for the case of lunatics who have *escaped* or been *acquitted* of a criminal charge on the ground of insanity. The court certify such cases to the asylum, and the county from which he is sent is made chargeable with the expense, to which there is a provision added, that "the county may recover the amount so paid from his own estate, if he have any, *or from any relative, town, city, or county that would have been bound to provide for and maintain him elsewhere*." The reference here to the *relative* town, city or county that would have been bound to provide for and maintain him, it is clear, is a reference to the provisions of the Revised Statutes, to which we have above referred, in relation to the safe keeping and care of lunatics (1 R. S. 634 [marg. p.] § 2), which is as follows:

"Section 2. If such person is not possessed of sufficient property to maintain himself, it shall be the duty of the father and mother, and the children of such person, being of sufficient ability, to provide a suitable place for his confinement, and to confine him in such manner as shall be approved by the overseers of the poor of the city or town." It is very clear that this section of the Revised Statutes is not applicable to this case, for it refers only to cases of lunatics who have not sufficient property to support them. By strong implication, however, we may suppose that those who have sufficient property are to have it applied to their support.

"Section 3. The overseers of the poor shall have the same remedies to compel such relatives to confine and maintain such lunatic or mad person, and to collect the costs and charges of his confinement, as are given by law in the case

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of poor and impotent persons becoming chargeable to any town."

By reference to the statute for the relief and support of indigent persons (1 R. S. 615, marg p.) the remedy in such cases is found; which is too familiar to be repeated.

Section 32 of the act of 1842 is applicable to this case, which is that of a lunatic in confinement (not acquitted), and under indictment. In this last case the county judge certifies to his insanity, upon investigation by physicians, &c., according to the provisions of the statute, and directs his removal to the said asylum to be kept as by the provisions in section 31. The last clause of this section, and which is the clause upon which the defense is based, is in the following words: "The provisions of the last preceding section [31], requiring the county to defray the expenses of a patient sent to the asylum, shall be equally applicable to similar expenses arising under this section and the one next following." Now, it is claimed by the defendants, that, though section 32 made the county of Onondaga liable for the support and maintenance of this lunatic, it did not, as did section 31, give the county a remedy over against the estate of the lunatic. And that this express grant of a remedy in the one case, and the omission to grant it in the other, is evidence of intent in the former, and demands the construction, that it was not so intended by the latter section. Although no reason can be seen for making a distinction, still, if the enactment in the statute of 1842 referred to no other, and ended with section 32, I should be inclined to hold to the correctness of defendants' construction. But there are other and further provisions in this statute to be considered, which have an important bearing upon the intent of the legislature by this enactment.

Section 35 makes provision for the regulation of the price to be paid for keeping poor or indigent patients to be sent to the asylum, which is not a general provision, but applies only to the indigent.

Section 36 provides that "Every insane person supported in the asylum, shall be personally liable for his maintenance therein, and for all necessary expenses incurred by the institution in his behalf. And the *committee*, relative, town, city

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or county that would have been bound by law to provide for and support him if he had not been sent to the asylum, shall be liable to pay the expenses of his clothing and maintenance in the asylum, and actual necessary expenses to and from the same." This section, so far as it applies to the persons to be made liable, is general, and is important in its effect in giving construction to the others. First, it plainly makes the lunatic personally liable, so that his estate could be reached, whether or not a committee had then been appointed; second, it provides, in case of the appointment of a committee, that they be made liable to the extent of his estate for his support, just as they would have been if he had not been sent there; and, third, it provides, in the absence of his having property, or a committee, that the existing laws, which make relatives, towns and counties liable for the support of the insane and poor, shall be resorted to, which in like manner made them liable for the maintenance and support of such insane person in this State institution. This section really declares no new rights or remedies in regard to the poor and indigent, but makes existing rights and remedies applicable to the support of such persons in this asylum. *People v. Supervisors of Genesee*, 7 *Hill*, 171. But it is still insisted, that, although this section fixes the liability of the lunatic and his committee for his support, it is only a liability to the State asylum, or to its proper officers, and does not give the county which paid the money in the first instance a remedy over against the committee. This same argument would render the proviso creating the liability entirely nugatory; for neither does it provide the State with any form of remedy to enforce the liability against the lunatic or his committee. The argument has no basis of support but the strictest technicality; it is reasoning against the plainest dictate of justice, that a statute should create a liability against a party, or compel another party to pay such liability, and yet afford the suffering party no remedy.

Section 37 of the act of 1842, which is general, makes the county from which such patient was sent, liable to pay such expenses, and directs the treasurer of such county to pay such expenses to the treasurer of the asylum. The last clause of

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this section is in the following words, "Said county, however, shall have the right to require any *individual*, town, city or county *that is legally liable for the support of such patient, to reimburse the amount of said bills*, with interest from the day of paying the same." It is very clear that this section does in terms give a remedy over upon the person, whoever it may be, that is legally liable. Who then is the person legally liable under this section, in a case where it is admitted there is sufficient means of the patient to pay? Clearly the insane person so supported. Section 36 makes him so, in terms. And his committee are the proper persons to be sued. In this particular consists the distinction between this case and that of *People v. Supervisors of Genesee, supra*, which is claimed to be controlling. In that case the town was sued, and the town was held not to be liable for the reason that the party who had been so supported, was not a "*pauper*," nor "*furiously mad*." Paupers and persons furiously mad were the only classes of persons that come within the sections of the Revised Statutes upon which the liability over in that case was claimed. That case decided only that question. It has no application here. The distinction between the cases is clear and palpable; and the decision of this case in the court below is not in conflict with that. To make the provision clear, and to adapt the whole system of the support of lunatics by all former laws to the new system connected with the State asylum, the act of 1842 provides as follows:

"Section 39. Every town or county paying for the support of a lunatic *in the asylum*, or his expenses in going to or from the same, shall have the like rights and remedies to recover the amount of such payments, with interest from the time of paying each bill, as if such expenses had been incurred for the support of the same, under existing laws."

It is very clear the provisions of this section 39 were intended to superadd, to the remedies already given in that act, the remedies which existed in the former statutes. It may be useful to refer to these former statutes as evidence that they also evince the same spirit and design of casting the liability of support upon the estate of the lunatic when he is possessed of means.

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What then were the rights and remedies by the existing laws in relation to the support of the insane, referred to in section 39? By 1 *R. S.* 634, § 1: "When any person, by lunacy or otherwise, becomes furiously mad, or so far disordered in his senses as to endanger his own person, or the person or property of others, if permitted to go at large, who is possessed of sufficient property to maintain himself, it shall be the duty of the committee of his person and estate, to provide a suitable place for the confinement of such person, and to confine and maintain him in such manner as shall be approved by the overseers of the poor of the city or town." Section 13 of the same act gives to the overseers of the poor of any city or town the same remedies, to compel the committee of the estate of any lunatic to confine and maintain such lunatic, and to collect of such committee the costs and charges of his confinement and support, as are given in the same act against the relatives of a lunatic; and section 14 of the same act gives to *superintendents* of the poor of the county the same power as is given by section 13 to *overseers* of the poor. And this same power, by section 39 of the act of 1842, is given to the *county* (to wit, the board of supervisors). The remedies by the existing laws so referred to, were those provided by sections 3, 13, and 14 of the *R. S. supra*, and also, in part, by the provisions of the act of 1827 (ch. 294), entitled "An act respecting lunatics," section 5 of which provided that "whenever a lunatic shall be confined pursuant to law, if such lunatic is possessed of any real or personal property, the same shall be first applied to defray the expenses of his confinement and support."

The difficulty that is found in determining the meaning and intent of the provisions of these several sections of the statute of 1842, arises from the fact of the existence, at the time of its passage, of two or more other statutes, relating in some particulars to the same subject, some of the provisions of which older statutes are partially modified by the act of 1842, and the act of 1842 refers to such existing statutes for the proper remedies. This difficulty is still increased when reference is made to the said existing statutes, as they refer again to statutes in relation to the support of the poor, for the

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kind of remedies which they afford against parties liable to support others.

But as I have already said, the statute of 1842 contains all the provisions applicable to this particular case, necessary to give the construction that the defendants are liable, that the action is well brought by the county of Onondaga, and that the estate of the lunatic is liable over for the sums they have paid on his account. Such, I think, is the letter, as well as the intent of the statute. I think the judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

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December, 1866.

Reversing 29 How. Pr. 71.

One who has sold property with the stipulation that the title shall remain vested in him until payment, retains, until such payment, an insurable interest.*

The seller of machinery stipulated that he was to remain owner until it was paid for, and the buyers insured it for his security, the policy stating that the loss was payable to the seller. The buyers subsequently mortgaged the property to plaintiff, who foreclosed the mortgage and bought in the property. The agent of the insurers, knowing of the interest of the seller in the property and the policy, received from the seller's agent the premium for a renewal, and the same agent of the defendants had notice of subsequent insurances effected by plaintiff on the property through him as agent for other companies. *Held*, that the insurance for the benefit of the seller was valid, and the facts that the mortgage was unknown to him, and that there was other insurance by the mortgagee, did not prejudice the former insurance, and that after an assignment of the claim for a loss on the former insurance to plaintiff he could recover thereon.

After the insurer's agent had, with knowledge of the facts, renewed for the benefit of the equitable owner, insurance first made in the name of the legal owners, additional insurance effected by one who acquired

* See also Wood v. Northwestern Ins. Co., 46 N. Y. 423.

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the title of the legal owners, without knowledge of the equitable owner, and without consent indorsed on his policy, does not prevent a recovery on such policy, even though the action therefor be brought by the person who effected such additional insurance, claiming as assignee of the former.*

John E. Tallman, as assignee of William C. Brown, sued defendants in the supreme court on an insurance of the machinery in a paper mill. Brown, when owner of the machinery, sold it in November, 1860, to the firm of Sturtevant, Sons & Co., for a price to be paid in five installments of five hundred dollars each, during a period of more than two years. The buyers agreed to keep the property insured in a sum equal to the amount due to Brown, and Brown was to hold the policies. They also agreed that although they were to have possession, Brown was to remain owner of the machinery until it was paid for.

They thereupon procured from defendants a policy expressing that the loss, if any, was payable to Brown. On the expiration of this insurance in January, 1863, a thousand dollars remained due to Brown; but Sturtevant & Sons did not apply for a further renewal.

Defendant's agent, one Chapin, knowing Brown's interest, applied to plaintiff, who appears to have acted as Brown's agent in the matter, and ascertained from him the amount due Brown, and asked him, plaintiff, if he would pay the premium on a renewal. Plaintiff did so, and the agent issued a renewal receipt and sent it to Brown's office. Shortly afterward a loss occurred, and plaintiffs paid Brown the amount remaining due him from Sturtevant, Sons & Co., and took from Brown an assignment of the claim on the insurance made by defendants.

After the fire, and before this assignment, Brown had presented his claim for loss, and made oath to the agent that he was sole owner of the machinery insured, and that no other person except Sturtevant, Sons & Co. had any interest therein.

On the trial of this action, however, it appeared that Sturtevant, Sons & Co. had previously mortgaged their interest to Tallman, the plaintiff, and that Tallman had foreclosed the

* Cited on this point in *Rowley v. Empire Ins. Co.*, p. 131 of this volume.

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being made without Brown's knowledge. Tallman, after thus acquiring the title, and before the loss, took out other policies on the same property in other companies, for which companies defendant's agent was also agent, and defendant's agent had notice of all this insurance.

The objections passed on on this appeal were presented by a motion for nonsuit, and by a request to charge the jury. They were:

1. That Sturtevant, Sons & Co. were not absolute owners when they insured; and did not disclose the true title.
2. That the last renewal was void, also, because not authorized by Brown.
3. That the firm of Sturtevant, Sons & Co. was dissolved before the last renewal, and no notice of dissolution was given to the defendants.
4. That the subsequent insurance in other companies was without notice to the defendants; and that the agent's knowledge thereof, acquired while acting as agent of the other companies, was not sufficient to charge defendants.
5. That Sturtevant, Sons & Co.'s mortgage to Tallman, given without notice to defendants, avoided the policy.
6. That the sale under the mortgage, without notice to them, had the same effect.
7. That the policy was void because Sturtevant, Sons & Co. had no interest at the time of the loss.

Under directions of the court the jury found for plaintiff, and defendants appealed.

The supreme court applied the rule that there must be an insurable interest, such as the contract specifies, and that it must exist at the time of loss as well as at that of the issue of the policy; that it was the interest of Sturtevant, Sons & Co., and not that of Brown's, that was insured, and that plaintiff's claim was subject to all the contingencies to which Brown's contract was liable. Reported in 29 *How. Pr.* 71.

Plaintiff appealed, and stipulated that if the order appealed from be affirmed, judgment absolute should be rendered against him.

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Wm. C. Brown for plaintiff, appellant;—Cited *Ætna Ins. Co. v. Tyler*, 16 *Wend.* 385, 401; *Phil. on Ins.* §§ 174, 180, 287; *Niblo v. N. A. Fire Ins. Co.*, 1 *Sandf.* 551; *Fletcher v. Commonwealth Ins. Co.*, 18 *Pick.* 419; *Kernochan v. N. Y. Bowery Ins. Co.*, 17 *N. Y.* 428; *Kenny v. Van Horn*, 1 *Johns.* 385; *Ames v. N. Y. Ins. Co.*, 14 *N. Y.* (4 *Kern.*) 253; *McEwen v. Montgomery Ins. Co.*, 5 *Hill*, 101; *Goit v. National Ins. Co.* 25 *Barb.* 189; *Post v. Ætna Ins. Co.*, 43 *Id.* 351; and see 4 *Bosw.* 179; *Hodgkins v. Montgomery Ins. Co.*, 34 *Barb.* 213; 1 *Phil. on Ins.* § 556; *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 *N. Y.* 460; *Hoffman v. Ætna Ins. Co.*, 32 *Id.* 405; *Liddle v. Market Ins. Co.*, 29 *Id.* 184; *Conover v. Sun Ins. Co.*, 1 *N. Y.* (1 *Comst.*) 290; *Shotwell v. Jefferson Ins. Co.*, 5 *Bosw.* 247; *Buffalo S. E. Works v. Sun M. Ins. Co.*, 17 *N. Y.* 403; *Herkimer v. Rice*, 27 *Id.* 173; *Lawrence v. St. Marks F. Ins. Co.*, 43 *Barb.* 480; *Wilson v. Genesee M. Ins. Co.*, 16 *Id.* 511; * *Columbia Ins. Co. v. Lynch*, 11 *Johns.* 232; *Mutual Safety Ins. Co. v. Hone*, 2 *N. Y.* (2 *Comst.*) 235.

Myers & Magone, attorneys for defendant, respondent;—Cited, *Jennings v. Chenango Mut. Ins. Co.* 2 *Den.* 75; *Chase v. Hamilton Ins. Co.*, 20 *N. Y.* 52; *Wilson v. Genesee Ins. Co.*, 14 *Id.* (4 *Kern.*) 418; *Angell on Ins.* §§ 55, 63; *Murdock v. Chenango Mut. Ins. Co.*, 2 *N. Y.* (2 *Comst.*) 210; 3 *Kenf's Com.* 344; *Hancox v. Fishing Ins. Co.*, 2 *Sumn.* 142; *The Saddler Co., v. Badcock*, 2 *Atk.* 554; *Lynch v. Dalzell*, 3 *B. P. C.* 497; 23 *Pick.* 418; *Wilson v. Genesee Mut. Ins. Co.*, 16 *Barb.* 511; *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 *Id.* 623; *Hoffman v. Ætna Ins. Co.*, 32 *N. Y.* 405 and cases there cited; *Buckley v. Garrett*, 11 *Wright's Penn.* (noticed in 4 *Am. Law Reg. N. S.* 441); *Tillou v. Kingston Mut. Ins. Co.*, 5 *N. Y.* (1 *Seld.*) 405; *Western Mass. Ins. Co. v. Riker*, 2 *A. L. Reg. N. S.* 127; *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 *N. Y.* 401; *Olcott v. Tioga R. R. Co.*, 40 *Barb.* 179; 27 *N. Y.* 546; *Butler v. Miller*, 1 *N. Y.* (1 *Comst.*) 496; *Ferguson v. Lee*, 6 *Wend.* 258; *Brown v. Bement*, 8 *Johns.* 96; *Ackley v. Finch*, 7 *Cow.* 290; *Mellen v. Hamilton Fire Ins. Co.*

* Reversed on the ground that the agent was not one to whom notice was sufficient, in 14 *N. Y.* (4 *Kern.*) 418.

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17 *N. Y.* 609; *Carpenter v. Providence Washington Ins. Co.*, 16 *Peters*, 495; *Bigler v. N. Y. Central Ins. Co.*, 22 *N. Y.* 402; *Gilbert v. Phoenix Ins. Co.*, 36 *Barb.* 372; *Grosvenor v. Atlantic Fire Ins. Co. of Brooklyn*, 17 *N. Y.* 391; *Id.* 401; *Bidwell v. Northwestern Ins. Co.*, 19 *Id.* 179; *Frink v. Hampden Ins. Co.*, 45 *Barb.* 384; *Foster v. Equitable Ins. Co.* 2 *Gray*, 216; *Boyle v. Colman*, 13 *Barb.* 42; *Anthoine v. Coit*, 2 *Hall Supp. C. R.* 40; *Lytle v. Erwin*, 26 *How.* 491; *Lockwood v. Thorne*, 18 *N. Y.* 286; *Id.* 293; *Conover v. Mut. Ins. Co.*, 1 *Id.* (1 *Comst.*) 290; *Masters v. Madison County Ins. Co.*, 11 *Barb.* 624; 1 *Phil. on Ins.* §§ 115, 172, 175.

DAVIES, Ch. J. [After stating the facts.]—On January 9, 1863, when Brown, the plaintiff's assignor, reinsured with the defendants, in the sum of one thousand dollars, his interest in the property covered by the policy, it was, in fact, an insurance for his benefit. As between him and Sturtevant, Sons & Co., he remained and continued the owner of the property covered by the insurance. The arrangement between Brown and that firm seems to have been well understood by Chapin, the defendants' agent. If Brown continued the owner of the property, notwithstanding the executory contract of sale of November, 1860 (and as between him and the firm, he certainly did) then the insurance was, in fact, upon his property, though, in form, upon the property of Sturtevant, Sons & Co. *Burt v. Dutcher*, 34 *N. Y.* 493. We said, in the case of *Bidwell v. Northwestern Ins. Co.*, 24 *Id.* 302: "Indeed, it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature) inserted in a policy, intended to reach broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be, by the company, as well as the insured. And to allow the company to take the premium without taking the risk, would be to encourage a fraud." We also held, in that case, that parol

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evidence was admissible to show that the property insured was the owner's equity of redemption in the vessel, which was subject to certain mortgages known to the insurer.

This is precisely what was shown upon the trial of this action. Sturtevant, Sons & Co. allowed the policy to expire, so far as it related to any interest they might have in it. It was then renewed by Brown, to cover his interest, and to the extent of his interest, and he, by his agent, paid to the defendants' agent the premium demanded; and to allow these defendants to take a premium for a known and intended risk, without assuming it, and holding them answerable for their contract, would be to encourage a fraud. Brown had an interest in the property covered by the policy, either as owner or mortgagee, to the extent of one thousand dollars. It was an insurable interest. The defendants assumed the risk of the preservation of the property for the period within which the claim of Brown was to be extinguished, and, in case of its destruction, to pay to him the sum agreed upon. That property was destroyed, without any fault or fraud on his part. He did nothing, after the issuing of the policy to him, and prior to its destruction, to change, in any particular whatever, his relations to that property. He made no transfer of it, or of his interest in it. He effected no other insurance upon it; and the fact of the mortgage to Tallman by Sturtevant, Sons & Co., of their interest in the property covered by this policy, was notified to the defendants' agent, and duly acknowledged. The subsequent foreclosure by Tallman of the mortgage and the sale, thereby vesting in him absolutely all the right, title and interest of Sturtevant, Sons & Co., without the knowledge, consent, or assent of Brown, cannot, in any way, impair or affect the rights of the latter, under his contract of insurance with the defendants.

The judge at the trial, therefore, properly refused to nonsuit the plaintiff.

[Remarks on immaterial exceptions are omitted.]

The order of the general term, granting a new trial, should be reversed, and judgment on the verdict should be affirmed, with costs.

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A majority of the judges concurred.

Order granting new trial reversed, and judgment on verdict affirmed, with costs.

TALLMAN v. SYRACUSE, &c. R. R. CO.

December, 1868.

The general railroad act of 1850 requires the companies to erect fences of sufficient height and strength to prevent cattle and other animals from getting upon the railroad.

The fact that the language of the act requires such fences to be of the height, &c., of a division fence required by law, while the statutes prescribe no height, &c., for division fences, does not render the act inoperative.

Moses F. Tallman sued the Syracuse, Binghamton and New York R. R. Co., in the supreme court, to recover damages for injuries to his cattle by defendants' engine in July, 1860, when the cattle were on the railroad where it crossed plaintiff's farm. At the time of the occurrence there was no fence on the east side of the railroad for a distance of forty rods between the railroad and plaintiff's farm, and in other places the fence there was so defective that cattle could easily pass from the farm on to the road. There was evidence tending to prove that the cattle must have come upon the railroad through these defects or absence of fence, and the neglect to maintain the fence was the ground on which plaintiff sought to recover.

Defendant asked the judge at the trial to dismiss the complaint on the ground that, as the only statute requiring railroad companies to maintain fences, requires them to maintain fences "of the height and strength of a division fence required by law," &c., and that, as there is no such height, &c., prescribed by statute for division fences, the requirement was inoperative. The court refused the request.

Defendants then gave evidence tending to prove that the cattle came upon the railroad through a gate which plaintiff had left open, thus exonerating themselves from negligence, but plaintiff gave evidence tending to prove that the gate had not been open.

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The court charged that if the jury found the cows were injured in consequence of the gate being left open, the verdict should be for defendants, but if in consequence of defendants' neglect to erect and maintain fences on the sides of their road, of the height and strength required by law, plaintiff should have a verdict for the amount of the injuries sustained; to which defendants' counsel excepted.

CLERKE, J. [After stating the facts.]—The only question, then, in this case, is whether the defendants were required by law to erect fences along the sides of the road between the plaintiff's farm and the railroad. The general railroad act of 1850 (*L. 1850, p. 233, § 44*), requires "that every corporation formed under this act, shall erect and maintain fences on the sides of their road, of the height and strength of a division fence *required by law*, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railroad. Until such fences and cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines, to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or wilfully done."

The defendants' counsel insists that no obligation rested on the defendants to erect the fences, because the statute directs that they should be of the height and strength of a division fence, "*as required by law*," and as there was no law fixing the height and strength of a division fence, the statute itself was a nullity, and could not be enforced. It does not appear that there is any other law fixing the height and strength of a division fence, and unless we can find in this act sufficient to warrant us, according to the rules governing the construction of statutes, the proposition of the counsel must probably prevail. In *Corwin v. N. Y. & Erie R. R. Co.*, 13 *N. Y. (3 Kern.)* 42, which was an action brought to recover damages

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for precisely the same injuries and omission as are alleged in this case, it was held, that a railroad corporation which omits to comply with the statute as to erecting and maintaining fences and cattle guards, is liable to the owner of cattle which stray upon the track from an adjoining close, or the highway crossing it, and that the mere negligence of the owner in permitting his cattle to stray upon the land of another adjoining the railroad, or to run at large upon the highway crossing it, is no defense to the corporation.

But the question relative to the alleged defect in the statute did not arise, or rather was not noticed, in that case. Indeed, it does not appear to have occurred to any one engaged in the trial or argument.

It cannot be denied, that it was the intention of the legislature to require from railroad corporations some protection for the public benefit, and that this protection consisted in erecting fences suitable for the purpose in view. The object of this provision of the statute is not merely to protect the cattle and other animals of adjoining or neighboring proprietors, but to protect the lives and limbs of passengers, and all persons connected with the train. A locomotive moving at the usual rate of velocity, attached to a long train of cars, coming in contact with an animal on the track, is in imminent danger of being thrown from it, together with some or all the cars composing the train, and thus the destruction of many lives, and injuries to the persons of many of the passengers would, probably, if not inevitably, follow. This provision of the statute, then, is unquestionably for the public good. The well known rule, consequently, applies: "A statute made *pro bono publico* shall be construed in such a manner that it may, as far as possible, attain the end proposed." *Pierce v. Hopper, Strange*, 253, 258 (referred to in *Bacon's Abridgment*, Statute, I, sub. 7). The New River water act was held to extend to places adjacent, although only the city of London was mentioned in it; "because all statutes made for the convenience of the public ought to have a liberal construction" (*New River Co. v. Graves*, 2 *Vern.* 431, referred to in *Bac. Abr.* Statute, I, sub. 7). It has always been enjoined as a duty upon judges to put such a construction upon a statute as may redress the mischief, guard

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against all subtle invention and evasions for the continuance of the mischief, and give life and strength to the remedy *pro bono publico*, according to the true intent of the makers of the law.

What was the evident intent of the legislature in enacting this provision of the railroad act of 1850? The intent clearly was, that railroad companies should erect fences of sufficient height and strength to prevent cattle and other animals from getting on the railroad. And if one portion of this section was transposed, or even if the punctuation was changed a little, the last part of the sentence may be applied to the erection and maintenance of fences, as well as to the construction and maintenance of cattle guards at all railroad crossings; so that the provision might be held to direct, that the fences should be of such height and strength as may be sufficient to prevent cattle and other animals from getting on the railroad. I think the construction given by the supreme court correct.

The judgment should be affirmed, with costs.

MASON, J.—There was no contest upon the trial, over the height and strength of the fence. There were forty rods beside the plaintiff's fields where no fence at all had been erected, and in many other places along the sides of the defendants' road, where it crosses the plaintiff's farm, the fence was defective, so that cattle could easily pass through and go upon the railroad.

The argument of the appellants' counsel, if I correctly appreciate it, is, that, as there is no statute fixing and defining the height and strength of a division fence, the defendants are absolved from the duty imposed upon them by the general railroad act to erect and maintain fences at all; or, in other words, that the general railroad act does not impose any duty upon the railroad in regard to fencing, because the law does not define the height and strength of a division fence. The whole scheme of our statutes, in regard to division fences, assumes that there is a standard fixed, and it is well known that there is such a standard fixed by the towns generally.

The revised statutes provide that the electors, in town meet-

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ing assembled, may make rules and regulations in regard to this matter in each town. 1 *R. S.* 341, § 5; sub. § 11, 4 ed. p. 647.

The plaintiff, I presume, did not go into proof upon this subject, because here were forty rods where there was no fence constructed, and in other places the fence was so radically defective as to afford no obstacle to cattle passing over it. There was no proof made in the case as to any action of the town of Preble prescribing any regulation in regard to division fences, and yet farms highly cultivated, with division fences, exist all through the town, and the jury who tried this case, I doubt not, were all familiar with the regulations in regard to division fences, as they were all farmers, and had to support and maintain them. Be this as it may. [The learned judge here recapitulated the statute above stated.]

The object of this statute requirement is to prevent these domestic animals from escaping from the adjoining fields upon the railroad track; and in considering this statute, Judge DENIO said, in the case of *Corwin v. N. Y. & Erie Railroad Co.*, 13 *N. Y.* 42, 54, that the design of the statute was "to require the railroad companies to inclose their track with substantial fences." This is, beyond doubt, required of them,—such a fence at least as will turn cattle and horses that are orderly and quiet.

This at least they must do, and the statute requires the fence to be of the height or strength of a division fence required by law, and whenever a case comes where the sufficiency of the fence is placed in doubt in the litigation, then it may become necessary to consult the town ordinance, and see whether the fence meets the requirements. This cannot be necessary where no fence has been built, or where it is so entirely out of repair and proper condition as was this fence. The question whether this fence was sufficient or not, was not raised upon the trial, and there was no error in the charge submitting the case to the jury. The defendants were clearly liable upon the proof, and the judgment should be affirmed.

All the judges present concurred in affirming the judgment.

Judgment affirmed, with costs.

Tanner v. Marshall.

TANNER v. PARSHALL

June, 1887.

In an action in which the question is whether a certain transaction was a sale of property, or a delivery to the defendant as agent of the plaintiff, it is competent to prove an entry made by the plaintiff, in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness.*

Upon such a question the jury cannot consider the actual value or the unsoundness of the property, as a circumstance in connection with the price, bearing upon the question.

Perry G. Tanner sued Anson C. Parshall, to recover the price of a horse alleged to have been sold and delivered to the defendant in September, 1856.

The principal question litigated on the trial, was whether the horse was sold to the defendant for five hundred dollars, or whether he was delivered to the defendant to be taken to New York, by one Baird, and sold on plaintiff's account; and on this question the testimony of the plaintiff and defendant was directly in conflict, and, with other evidence more or less bearing upon the truth of the version of either party, was submitted to the jury, who found for the plaintiff.

On the trial, the plaintiff, under the objection and exception of the defendant, was permitted to show that on the same day that he claimed to have sold the horse to the defendant, he went to his store, and in the absence of the defendant, made an entry in his book of accounts, charging defendant with the horse, at five hundred dollars, and that he subsequently exhibited this entry to the defendant, who admitted its accuracy. The judge allowed the entry to be read to the jury, and charged that it was a circumstance tending to prove the alleged sale. The principal question in the case was, whether this evidence was properly admitted.

* See Partridge v. Gildermeister, vol. 3 of this series, p. 461; Downs v. Sprague, vol. 1, p. 550.

Tanner & Parshall.

John H. Reynolds, for defendant appellant.

L. J. Burditt, for plaintiff, respondent.

BY THE COURT.—HUNT, J.—This case was eminently one for the jury. We have nothing to do with the decision. We accept it as the correct determination of the disputed facts before them. The legal proposition before us is quite simple. We are not called upon to decide whether the entry by the plaintiff of the sale of the horse to the defendant, in the plaintiff's book, was a part of the *res gesta*, nor are we to decide whether the entry alone would have been competent evidence. Here the offer to read the evidence was accompanied by the offer, also, to prove that the entry was subsequently read to the defendant, and that he admitted its correctness. That a statement by the plaintiff to the defendant, whether verbal or written, charging the latter with the purchase of a horse, at the agreed price of five hundred dollars, which statement was then assented to by the defendant, is competent evidence against the latter, would seem to be too plain a proposition for discussion. The offer, as made, was proved, and was corroborated by the defendant, so far as that he admitted that the statement was read over to him. He denied that he admitted its correctness, or promised to pay it.

The charge to the jury was upon the same subject matter, and in reference to the whole of the same. I think there could have been no misleading of the jury, and no misunderstanding by them of the questions before them.

The judge further charged the jury that in determining whether the defendant bought the horse, and agreed to pay five hundred dollars for him, they had no right to take into consideration the actual value, or the unsoundness of the horse, as a circumstance bearing on that question. If the jury had been engaged in deciding whether the defendant had made a good bargain in purchasing the horse, such evidence would have been material. So if there had been inquiry whether there had been a breach of an alleged warranty of soundness, the evidence referred to would have been important. But it was entirely immaterial upon the question

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whether the defendant had purchased the horse or had received him from the plaintiff to sell on his account. As a legal proposition it could have no tendency to establish either a sale or an agency. There was no error in the instruction to the jury.

Neither was there any error in this instruction: that if the defendant heard the remark which the plaintiff's daughter testified that the father made to her, "that he had sold Billy," and did not deny it, it was competent evidence. The presence of the parties there, and the taking away of the horse by the defendant, would justify the jury in applying the remark to the horse in question.

The judgment should be affirmed.

GROVER, J., dissented, on the ground that reading the entry or charge to the defendant a long time after it was made, and his promise to pay the amount, did not render testimony that the entry was made by plaintiff immediately after his arrival at the store, after the alleged sale, competent evidence of such sale.

All the other judges concurred with HUNT, J.

Judgment affirmed, with costs.

TAUTON v. GROH.

September, 1869.

Under section 123 of the Code of Procedure, it is proper to grant an order of interpleader to a defendant who admits the debt and desires to pay it, and alleges that a controversy as to the right to collect it exists between the plaintiff and a third person, in which defendant has no interest; although it be not alleged that defendant is in doubt as to the right. *So held* in foreclosure, where the third person claimed as the payee named in the mortgage, without, however, having possession of the mortgage, and plaintiff claimed as assignee, having possession of the mortgage, but no other evidence of title.

Elizabeth A. Tauton, executrix of Jesse Tauton, brought this action against Jacob Groh and others, in the supreme court, to foreclose a mortgage made by the respondents to one Louisa T. Milman for twelve hundred dollars. Plaintiff claimed

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that her testator, Jesse Tauton, had, in his lifetime, purchased the mortgage from the said Louisa for a valuable consideration, and that Louisa had assigned it to him, and that plaintiff, as his personal representative, was entitled to collect it.

Louisa claimed that she was the owner of the mortgage, and had never made any assignment of it to any one, equitable or otherwise, and notified the defendants not to pay it.

No written assignment by Louisa T. Milman of the said mortgage appears to have been executed or recorded.

The respondents, under section 122 of the Code of Procedure, moved at special term for leave to pay the money into court, and be discharged from any liability therefor, and that the said Louisa be substituted in their place and stead as a party defendant. The statements of the different affidavits appear in the opinion.

The court, at special term, ordered that on payment by the respondents to the county clerk of the amount claimed in the summons and complaint, principal and interest, less ten dollars, costs of the motion, the said Louisa T. Milman be substituted as a party defendant in their place and stead, and that the respondents be discharged from liability to either party; and that Louisa T. Milman, within ten days from the payment of said money into court, execute and deliver a satisfaction of said mortgage, duly acknowledged, to the respondents; and it was therein further ordered, that if the said Louisa did not appear and defend said action within twenty days thereafter, the appellant should be at liberty to apply for an order that said money so deposited be paid over to her.

The supreme court, at general term, on appeal, modified the order, by directing the respondents, as a condition of the substitution, to pay to the appellant the costs of the action up to the time of the motion, but in other respects affirmed the original order. Plaintiff appealed.

A motion to dismiss the appeal was made in this court, on the ground that the order was not appealable, and was denied.

A. J. Parker, for plaintiff, appellant,—Insisted that the affidavits were not sufficient to warrant the order, there being no

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averments that defendants did not know who was entitled to the payment, or were ignorant of the rights of the parties. That under the Code, the rule as to the necessary facts to sustain an interpleader is the same as under the practice in chancery. 8 *Paige*, 347; 3 *Barb. Ch.* 573, 391; 1 *Abb. Pr.* 256, 260; 11 *Id.* 3; 11 *How. Pr.* 159.

Dennis McMahon, for defendants, respondents,—Objected that the order was not appealable, and insisted that the affidavits stated all that the Code requires. Defendants could not state ignorance, for they gave the mortgage to Mrs. Milman, and had paid interest to her.

BY THE COURT.—JAMES, J.—This order, as modified by the general term, was both just and right. The action was to foreclose a mortgage made by defendants to Louisa T. Milman, and claimed to be held by plaintiff as part of the assets of her trust. The execution and validity of the mortgage were not denied. It was admitted to be due, and the mortgagors did not wish to control or delay its payment. On the contrary, they had the money, and were anxious to satisfy and discharge the mortgage. But the mortgagee still claimed the mortgage as her property, and the money due upon it as due to her. She declared that she had never parted with her title to it, and had notified the defendants of this, and forbidden them to pay it to the plaintiff. The plaintiff had found the instrument among her testator's effects, but there was no written assignment attached, and none could be found to verify the testator's title.

Under this state of facts, the defendants procured the order appealed from.

The Code, section 122, provides that "a defendant, against whom an action is pending upon a contract, &c., may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes a demand against him for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the

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amount of the debt, &c.; and the court may, in its *discretion*, make the order."

This order was based upon an affidavit of the defendants, entitled in the action, setting forth that said mortgagee has made demands upon them for the payment to her of the amount due on said mortgage, and has notified them not to pay said mortgage to any person but her, and claims that she is the sole and lawful owner of the said mortgage, and that said claim or demand was made without any collusion or understanding between said Louisa and defendants, or either of them: also, upon an affidavit of their attorney, that no answer to the action had been put in, and that he knew, of his own personal knowledge, that Louisa T. Milman had claimed, and now claims, that said mortgage is her property, and that no other person has any interest in the same: also, affidavits of service of notice of this application upon said Louisa T. Milman and the plaintiff's attorney: also the affidavit of said Louisa T. Milman, that said mortgage is her sole and exclusive property; that she never assigned or agreed to assign the same, or any interest therein, nor ever received any consideration for any assignment thereof: also, the summons and complaint; and also, upon the affidavit of the plaintiff's attorney, in opposition, that said Louisa T. Milman did in April, 1866, sell and assign to plaintiff's testator said mortgage, and the bond accompanying the same.

These affidavits gave the special term jurisdiction in the matter of the application, and the allowance of the order was in its discretion. It is so declared by the Code; and being discretionary, it most likely was not the subject of review. I am, therefore, of the opinion that the appeal should be dismissed.

If, however, the order is appealable, it should be affirmed. Its justice to the defendant is too transparent to require illustration. They make no contest; they admit the obligation, and that it is past due, and desire to pay it. The contest is between others for the money. The instrument is not negotiable. One claimant is the payee named in the mortgage, without possession; the other is the possessor of the mortgage, without any other evidence of title. The only matter in dis-

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pute is the ownership of the mortgage. In that the defendants have no interest. It is asserted, that sustaining this order will produce litigation and complication between mother and daughter. But that is a matter this court can not consider. It is not an element in the case. The Code, section 122, provides for protection to a defendant; and if a case is presented showing him entitled to the benefit of its provisions, in the discretion of the court below, this court cannot review it because it may produce complication between the several claimants of the fund.

On the merits, the order should be affirmed.

A majority of the judges concurred in holding that the order was right upon the merits.

WOODRUFF, J., dissented, on the ground that the provision of the Code relied on ought not to be regarded as changing the requisites or grounds necessary to make a case for interpleading; and that the mere statement that a third person claims the subject in litigation, without showing that the defendant is ignorant of the right, or is not fully able to protect himself against the claim of the third person, or without showing in some way that interpleading is necessary, is not enough.

The object of the legislature in enacting section 122 of the Code was not to change the grounds of interpleading, nor to extend the remedy to new cases, but merely to make the remedy simple, speedy, and summary. Hence the order should not be sustained in a case like the present, where no pretense of doubt is stated. Citing *Bedell v. Hoffman*, 2 *Paige*, 199; *Bell v. Hunt*, 3 *Barb. Ch.* 391; 8 *Paige*, 347; 2 *Hoffm. Ch. Pr.* 99, 100.

HUNT and MASON, JJ., were also understood to be for reversal.

Order affirmed, with costs.

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TAYLOR v. BRADLEY.

June, 1868.

For a breach of an agreement to let land on shares, the occupant or farmer may maintain an action immediately, without awaiting the expiration of the term.

An agreement to let a farm for a term of years, each party to furnish part of the tools, materials, &c., and one to cultivate it and have certain supplies, after which all products are to be equally divided—may be regarded, neither as a mere lease nor as a contract for services, but as a special contract, partaking the nature of an adventure.

The measure of damages on a breach, by the owner or lessor is, the value of such privilege of occupying and working the farm, subject to the conditions of the agreement, and under all the contingencies that are liable to affect the result.

Whether plaintiff hired another farm, in consequence of being refused possession under the contract. and, if so, what it cost to remove thither, are not relevant questions; and it is error to limit his recovery to the expense of such removal.

Whether the value of such a contract may be proved by the opinions of witnesses,—*Query?*

Lewis C. Taylor sued Henry M. Bradley, in the supreme court, for breach of a special contract, by which defendant agreed to let to plaintiff for three years from a future day, a farm of one hundred and eighty-six acres; each party to furnish half the tools, &c., and pay half the taxes, and the lessee, or farmer, to have certain family supplies from the products of the farm, after which all products were to be divided equally.

Before the commencement of the term, the defendant, who was not in fact the owner of the farm, but only a purchaser having a contract for its conveyance, assigned his contract to one Ingraham, who obtained a conveyance, took possession, and refused to give possession to plaintiff.

At the trial the judge admitted evidence of the necessity and the cost of plaintiff's hiring another farm, and the expense of removing thereto; and limited plaintiff's damages to the difference between this expense and what would have been the expense of removing to the farm defendant agreed to let.

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The supreme court affirmed a judgment, on a verdict for fifty dollars, for this amount of damages. Plaintiff appealed to this court.

At the March term the following opinion was read in consultation :

GROVER, J.—The case shows that at the time of making the contract by the parties, for the breach of which the action was brought, the defendant held a contract for the purchase of the farm in question from the owners in fee ; that, before the time for the entering upon the performance of the contract between these parties, the defendant sold said contract to one Ingraham, and that the owner of the fee conveyed such farm, in pursuance thereof, to Ingraham. This shows that the defendant had such an interest in the farm, as would have enabled him to perform his contract, had he chosen to do so. Then it follows that the class of cases cited by defendant's counsel, fixing the rule of damages between vendor and vendee, lessor and lessee, when the vendor or lessor can not perform his contract because of a want of title, have no application to this case.

It is not material whether the contract between these parties created the technical relation of lessor and lessee between the parties. The contract is in writing, clear and explicit in its terms, and in substance, that defendant should let the plaintiff the farm for three years; that it should be stocked with twenty-five cows, each furnishing half; that the plaintiff should cultivate the farm, and, with certain exceptions, the products should be equally divided between the parties. From the case it appears that the plaintiff was prepared, ready and willing to perform this contract; that the defendant had, at the time of entering into the contract, such title as enabled him to perform, but that he sold and parted with this title voluntarily before the time fixed for the plaintiff to take possession of the farm. The suggestion of the defendant's counsel, that the plaintiff consented to this sale, is not sustained by the facts of the case, nor was the case disposed of upon any such theory in the supreme court.

The question is simply, what damages, if any, is the plaintiff

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entitled to recover for the violation of this contract by the defendant, his failure to perform not arising from any defect of title or other inability to perform. It was held by the court below that the plaintiff was entitled to recover the additional expense of removing his family and effects to another farm, hired by him, about four miles more distant from his residence than the farm in question, over what it would have cost to remove to the one in question. And the court, in substance, limited his recovery to such expense. Upon what principle or authority this expense was allowed is not apparent to my mind, but, as the defendant has not appealed, and this question has not been discussed by counsel, I shall not examine or attempt to decide it. If the plaintiff can recover this and nothing more, it would follow, that, had not the plaintiff had occasion to remove, he could only have recovered nominal damages. The plaintiff insisted upon his right to recover damages sustained by him in consequence of being deprived of the benefits he would have derived from performance. This was rejected by the court. This ruling is sought to be sustained upon the ground, first, that the action was commenced before such benefits and gains would have been received by the plaintiff in case of performance; and, secondly, upon the ground that such benefits and gains were so uncertain and contingent that the law will not permit a recovery therefor.

The first ground clearly cannot be sustained. If the contract was valuable to the plaintiff, he was at once deprived of this value by its violation by the defendant, and his cause of action therefor was complete, as much as at the end of the term. This must be considered as wholly independent of the second ground. This view is sustained by *Masterton v. Mayor of Brooklyn*, 7 *Hill*, 61; *Bagley v. Smith*, 10 *N. Y.* 489, and by numerous analogous cases, where damages in cases of personal injury, sustained after the commencement of the action, are held to be recoverable.

The principal difficulty arises upon the second ground. Questions of this character have been before the court in a vast number of cases, and their solution has been attended with much difficulty. The same rule has not been applied to all cases seemingly within the same principle. An ex-

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amination of the cases will show that the courts have been endeavoring to establish rules, by the application of which a party will be compensated for the loss sustained by the breach of the contract; in other words for the benefits and gains he would have realized from its performance, and nothing more.

It is sometimes said that the profits that would have been derived from performance cannot be recovered, but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. *Griffin v. Colver*, 16 N. Y. 489. Upon this principle it was held that a party, who had contracted for an engine to propel machinery to be delivered upon a given day, could recover, as damages for the delay, the value of the use of the machinery to be propelled by it, although he could not show the profit he would have made by dressing lumber with such machinery, the latter being contingent. This shows the contingency or uncertainty upon which the rejection of the claim was based. It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. In the case referred to, it was certain the plaintiff would have had the benefit of the use of his machinery had the engine been received; but it was contingent on other matters whether profits in dressing timber therewith would have been realized; therefore the former was allowed and the latter rejected. Judge SELDEN, in his opinion in *Griffin v. Colver*, arrives at the conclusion, that had the plaintiff in *Blanchard v. Ely*, 21 Wend. 342, claimed damages for the loss of the trips of his steamer; that is, what she could have been chartered for such trips, he could have recovered therefor; but as he claimed to recover the profits he could have made upon such trips, the claim was rightly rejected, as it was uncertain whether there would have been any profits had the trip been made. It is sometimes said that speculative damages cannot be recovered, because the amount is uncertain; but such remarks will generally be found applicable to such damages as it is uncertain whether sustained at all from the breach. Sometimes the claim is rejected as being too remote.

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This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of.

The general rule is, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain. The latter description embraces, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount. Thus it has been held that a party agreeing to lease real estate, having title, who refuses to perform his contract, is liable for the difference between the rent agreed to be paid and the actual value of such rent. *Driggs v. Dwight*, 17 *Wend.* 71. The real value of the rent of real estate is more or less uncertain, particularly in country localities, and must always be determined by proof, and that often conflicting, and yet this has never been suggested as a reason against a recovery. In this case, Judge COWEN says, the measure of damages was certainly not confined to the difference of rent. The jury might look to the actual value of the bargain which the plaintiff had made. But the latter remark, I think must be understood only as enabling them from this source to determine the real value of the rent. In the present case, the natural, immediate, and direct consequence of the breach by the defendant, was to deprive the plaintiff of his right to the use of the farm, and the half of the products for three years, and I can see no reason why the plaintiff should not recover compensation for this, the same as though the contract gave him the use of the farm and all its products for the like term for a specified money rent. The uncertainty as to the gains in the latter case, so far as seasons and fluctuating markets are concerned, would be the same as in the present case.

It is clear that such uncertainty would be no barrier in the way of a recovery in case of a certain money rent. I think such uncertainty no obstacle to a recovery in the present case.

But the question still remains, how is the value of the plaintiff's bargain to be determined? In the language of SELDEN, J.: "The law uniformly adopts that mode of estimating dam-

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ages which is the most definite and certain." In *Masterton v. Mayor (above)*, where the marble had no fixed value, it was held that resort might be had to proof of the cost of furnishing it in the condition required for delivery. In accordance with this rule the value of the interest of the plaintiff must be proved by experienced farmers, acquainted with the business of farming and with the farm in question. This may be readily done if such an interest has a market value and the witnesses can testify to such value. The mere conjectures or opinions of witnesses can not be received. If it shall appear upon trial that the value of the plaintiff's interest can not be proved as above, for the reason that such an interest has no ascertainable market value, facts must be proved; the quantity of land improved, the quality of the soil, the quality of the various kinds of products in ordinary years; the market value of such products at the time of the breach, or at the usual market season therefor of the year before, the value of labor in cultivating the farm; and from these and other facts tending to throw light upon the question, the jury must determine the value of that bargain to the plaintiff at the time of the breach by the defendant. I think the court were correct in excluding the claim of the plaintiff for time employed in purchasing the cows he was to furnish, or the loss upon a resale of such cows. Such damages were not the direct, immediate consequences of the breach of the defendant, but depended upon other contingencies. The plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity of the law in ascertaining its amount. He ought to receive no more than he would if at the time of entering into the contract he had had on hand the cows and other things required by him for performance on his part.

My conclusion, unaided by any opinion of the court below, or any argument or brief upon the part of the appellant, is, that the judgment appealed from must be reversed and a new trial ordered, costs to abide event.

The court, not being agreed, reserved the cause for future

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consideration. At the *June term* the following opinion was delivered:

WOODRUFF, J.—No question appears to have been raised on the trial touching the liability of the defendant. Although it was alleged in the answer that the sale of the farm in question was by the consent of the plaintiff, and such consent is set up as a rescission of the contract declared upon, the proof obviously failed to establish such a rescission, and the case was properly treated as one in which, after the execution of the agreement, the defendant had voluntarily sold the farm and had broken his engagement with the plaintiff, and had thereby subjected himself to the payment of whatever damages the defendant had sustained thereby, to be assessed according to such rule as the law prescribes.

Neither the industry of counsel nor my own research has discovered any adjudged case in which the rule of damages for the breach of such an agreement has been declared.

In ascertaining the rule it may be material to determine what is the character of the agreement, and what relations would arise between the parties had it been carried out by mutual performance.

The words of the agreement express an undertaking by the defendant "to lease and to farm let" to the plaintiff the farm in question, known as the Gray Farm, for the term of three years. The further provisions show that the farm was to be stocked and furnished mainly by equal contribution of the parties, the plaintiff to wholly furnish some things, and to occupy and work the farm; the defendant to wholly supply and pay for other things, and to have the privilege of also working and improving the farm; and all the proceeds of the farm (over and above keeping the stock thereon, and the use of certain specified articles in the plaintiff's family), are "to be divided between the respective parties equally, share and share equal, both as to expenses and profits arising from said farm."

If this agreement is to be treated as an agreement for a lease, such as if carried into execution would create the relation of landlord and tenant, then some guide or principle governing

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the recovery of damages will be found in cases of the breach of agreements to lease.

If it is to be treated as a contract for work and labor, the compensation therefor to be made in the partial support of the family on the farm, and in the final division of the proceeds of the cultivation, then some analogy will be found in the cases which declare the rule of damages for a breach of contracts to employ for definite term.

And if it shall appear to be an agreement of a mixed nature, containing some of the characteristics of both, the rule must be derived from general principles that may be in harmony, if possible, with both, or, at least, conformable to the law of contracts generally.

In *Jackson ex dem. Colden v. Brownell*, 1 *Johns.* 267, the permitting of two persons to reside on the farm for one year, cultivate it, and divide the grain with other two, who held under a lease from the lessor of the plaintiff, and also resided thereon, was held a breach of the condition of a lease which forbade more than two families, or tenants, to "reside on, use or occupy any part of the premises." And to the claim that the two persons so cultivating the farm were mere servants and that their contract was a contract for labor and service, to be paid for out of the crops, *LIVINGSTON, J.*, says: "The only question is, whether they were tenants or barely servants; each had every character of a tenant and not of a mere laborer for the owner of the soil; they took under a contract for a year; they occupied the same house; they held an interest or estate in the land; they paid rent in grain; they might bring their own cattle on and reap what they pleased from it for their exclusive benefit, except grain, which was to be divided."

In *Foote v. Colvin*, 3 *Johns.* 215, where one Litchfield sowed fourteen acres of land belonging to the plaintiff Foote with rye, on an agreement that Foote should have one-third of the crop and Litchfield two-thirds, to be divided upon the field, it was held that the two had a joint interest in the crop, and as such, could maintain trespass against a wrong-doer who cut and carried it away; and to the argument that Foote's share on the division provided for was to be regarded as rent, and,

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therefore, as the property of the cropper as tenant until gathered and divided, SPENCER, J., holding that the property was joint, says: "This seems best to promote the intentions of landlord and tenant; if the portion reserved for the landlord was to be considered as rent, and in which he was to have no interest until severance and delivery, it would put it in the power of tenants clandestinely to alienate the produce of the land, to the injury of the person who had enabled them to raise the crop."

And, in *Bradish v. Schenck*, 8 *Johns*. 151, where Schenck brought an action of trespass *quare clausum fregit* against Bradish, for damage done to a crop, it was proved that one Curtiss "took the land of the plaintiff and planted it with corn upon shares." To the objection that the possession was in Curtiss, as tenant, and the property in the crop was in him, it is said, *per curiam*, "letting land upon share for a single crop is no lease of land, and the owner alone must bring trespass for breaking the close. Schenck and Curtiss were tenants in common of the corn," &c.

On the other hand, in *Stewart v. Doughty*, 9 *Johns*. 107, where one Van Antwerp let a farm for six years to A. Stewart, the latter stipulating "to render, yield and pay to Van Antwerp the one-half of all the wheat, rye, corn and other grain raised on the farm in each year, in the bushel, after deducting the seed," with the right reserved to each to terminate the arrangement on giving six months' notice, in an action of trespass by Stewart, Junior, claiming under A. Stewart, for breaking, entering and carrying away the crop, against the defendants, who justified as servants of Van Antwerp, who had given the six months' notice, and A. Stewart had removed in compliance therewith,—it was held, KENT, Ch. J., giving the opinion, that the crop belonged to A. Stewart as emblements, notwithstanding "the lease was determined. The sale of it while in the ground, before the notice to quit, as the property of A. Stewart, was a valid sale. That the whole property in the grain was in the lessee. That, it being a lease for five years, by which Van Antwerp "rented and hired, and suffered the lessee to possess and enjoy the farm, and gave him the quiet and uninterrupted possession," &c., an interest in the soil

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passed, and the lessee would have been entitled to an action of trespass for any unlawful entry upon it. That the proportion of the productions of the farm which the tenant was yearly to render, was a payment of rent in kind. They were not tenants in common in the crops and productions raised; the interest and property in the crops was exclusively in the tenant until he had separated and delivered to the lessor his proportion. And, accordingly, the purchaser, having the exclusive interest in the crop, could maintain the action against the lessor for entering, cutting, and carrying away.

In *Overseers v. Overseers*, 14 *Johns.* 365, where it appeared that one Sweet "lived and worked on a farm in Fort Ann, in common with one Hotchkiss for about three years, the farm being worth about one hundred dollars a year, and that they held the farm on shares, rendering half the produce to Mead, the owner, the court, holding that Sweet thereby gained a settlement in Fort Ann, place the decision on the ground that the transaction was a "*bona fide* renting and occupying as tenant . . . for two years and actually paying such rent," within the statute which makes that the test in determining the place of settlement. "Hotchkiss and Sweet had the entire control and ostensible possession of the farm, to sow and plant according to their discretion for three years. The one-half of the produce which they had a right to retain is not to be regarded as a mere rule of compensation for their labor; but the one-half which they were to yield to the proprietor of the land ought to be considered as rent for use of the farm."

Again: in *De Mott v. Hagerman*, 8 *Cow.* 220, where, in an instrument under seal, dated April 1, 1824, "John De Mott agrees to let said Billson work a part of his farm, &c., Billson to work such part as De Mott shall or may direct, to put all grain in, in good order, to find all the seed, and out of the crop deduct De Mott's one-half of seed so found; to deliver to De Mott at his store one-half of all the produce raised on said farm, &c.; said Billson to go on the farm as soon as convenient, and leave it on the first day of April next,"—it was held, that this was a letting of land upon shares, not a lease; and, as to the grain raised, the plaintiffs were tenants in common."

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If these six cases can be harmonized, it must be on the ground, that three of them hold that such an arrangement as we are considering, when made in reference to a single crop, is not a lease, and the share reserved to the owner is not rent; but the others, that, when the arrangement is for one or more years, the agreement of hiring is a lease, the whole property in the crop is in the cultivator as tenant, it may be sold as his sole property, and the owner of the land acquires no interest therein until it is secured and divided and delivered to him, and then he takes it as rent. The use of the terms "let" or "lease," if that could be resorted to, to ascertain when the parties intend to create the relation of landlord and tenant, will not harmonize these cases, because terms were employed in most or all of them, which are apt to create a lease.

If these last-named cases were to govern the agreement now before us, we should be able to give it a specific character, and by referring to the rule of damages for a breach of an agreement to lease, possibly find some guide to the determination of the question raised by this appeal.

But, subsequent cases have not followed those which held that the arrangement has the effect lastly mentioned.

In *Caswell v. Districh*, 15 *Wend.* 379, the agreement by the owner was, "to let Districh (the defendant) have his farm for one year," and Districh agreed to sow oats and give the owner one-third in the half bushel; corn one-third in the basket; wheat one-third in the half bushel, &c. And the court say of this, "the agreement was a letting of the premises upon shares, and, technically speaking, it was not a lease," approving *Foot v. Colvin*, *Bradish v. Schenck*, and *De Mott v. Hagerman*, above referred to; although here, the agreement was for a fixed term, like *Jackson v. Brownell*. They hold, also, that the portion of the crops to be paid to the owner, was not by way of rent, in which case the property would be in the tenant until a division, but secured to the owner a property in the crop *ab initio*, and so made the two parties tenants in common.

The court intimate, that the decision in *Stewart v. Doughty* can be distinguished on the ground, that there the phraseology of the instrument so corresponded with the terms usual in leases as to indicate that the portion of the crops was in-

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tended as payment of rent in kind, and hence, the whole interest belonged to the tenant until division.

In *Putman v. Wise*, 1 *Hill*, 234, the relation created by such arrangements is very elaborately discussed. There the instrument was in form substantially like that in *Stewart v. Doughty*. It was under seal; the owners "do, by these presents, lease and to farm let all said lands to the parties of the second part," &c.; then followed particular details, as to the furnishing of seed, &c.; and the parties of the second part covenanted "to yield, pay and give to the parties of the first part one-half of all the grain raised, to be delivered at," &c., with details as to the mode of cultivating, &c.; the feeding of sheep supplied by the parties of the first part; division of the wool; and that the parties of the first part should have the land from April 1, 1836, to April 1, 1837, and if they performed the agreement in a manner satisfactory to the owners, they should have it another year on the same terms.

Mr. Justice COWEN, in giving the opinion of the court, reviews the previous cases, particularly *Stewart v. Doughty*; regards *Caswell v. Districh* as in principle overruling it; repudiates any distinction founded on the employment of terms of "letting," "leasing," "rendering," &c., or on the difference between an agreement that is to continue for a single crop or more years; and holds, that the arrangement is, that the occupants or croppers shall come in rather as servants than tenants, taking an interest in the crops and other products as compensation for their labor. The owners are compensated for the use of their land by a share of the crop, and the occupiers are compensated for their labor. That this makes them tenants in common of the crops and products, unless the terms of the contract (which might be, without legal objection) are such as to secure to one or the other an exclusive interest in some or one of the particular crops or products. If division of products be contemplated, a tenancy in common arises in such as are to be divided.

He refers to numerous cases, chiefly from New England, to the effect that the occupier, being a mere servant, cannot maintain trespass *quare clausum fregit*, but the owner only. That his possession is that of the owner. That he has no interest

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in the land he can assign, and on his death the contract would be at an end.

This case was followed by our present supreme court in *Dinehart v. Wilson*, 15 *Barb.* 595.

This latter view of the subject is in conformity with the cases in Massachusetts, New Hampshire and Maine; *Lewis v. Lyman*, 22 *Pick.* 437, and the cases therein referred to being prominent. And a case furnishing a very close analogy is found in Connecticut,—*Loomis v. Marshall*, 12 *Conn.* 69. See *Bennett v. Platt*, 9 *Pick.* 558; *Chandler v. Thurston*, 10 *Pick.* 209; *Beaumont v. Crane*, 14 *Mass.*, 400; *Melville v. Brown*, 15 *Id.* 82; *Dockham v. Parker*, 9 *Greenl.* 137; *Kittredge v. Woods*, 3 *N. H.* 503; *Robertson v. George*, 7 *Id.* 306; *Bishop v. Doty*, 1 *Vt.* 37.

If the question were new, I should say unhesitatingly that each case ought to be chiefly governed by the language employed by the parties to express their intention. Nor do I perceive any legal objection to a stipulation in a lease for the payment of rent in wheat or product of the land leased. In general, in a lease for years, or a grant in fee, reserving rent, when it is payable in specified articles, as a certain number of bushels of wheat and so many fowls, &c., it is entirely clear that the parties expect that the payment will be out of the product of the farm. Nor would the reservation be any less rent, in my apprehension, if the reservation were in terms "rendering, delivering and paying so many bushels of wheat out of, or parcel of, the wheat raised on the farm."

Parties are certainly at liberty to define and establish their legal relations by the use of terms legally appropriate to the object; and it is not clear to my mind that courts should not give effect thereto, according to their understood legal meaning.

Hence, when A. agrees with B. that he will employ B. with his team, &c., upon his farm, whether for one year or five, leaving B. at liberty to cultivate such fields and plant such crops as he shall see fit, with just regard to what good husbandry requires, and to pay B. for his work, labor and services, one-half of the crops raised, it is obvious that the parties in-

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tend an agreement for work, labor and services, to be paid for by A. in a share of the results.

On the other hand, if A. should demise, lease and let the farm to B., to have and to hold for the term of one or five years, to be cultivated in a husband-like manner, rendering and paying to A. an annual rent for the use of the farm, to wit, one-half of the crops raised,—I perceive no sensible reason why the parties should not be deemed to intend an actual and technical lease, which would entitle the lessee to possession, give him a term in the land, make his payment rent in the technical sense. It may well be inferred from this language, contra-distinguished from the other, that here it was intended that the tenant should have exclusive possession and the whole ownership for the term, subject only to his duty to pay the rent as it accrued. While, in the other case, it would be equally plain that the owner did not intend to divest himself of possession or of title to the crops, but to come under an obligation and duty to compensate for the services by paying therefor out of and according to the quantity of the products. In each case the result at the end of the term, if both performed, would be precisely the same, and yet it may be deemed by parties contemplating such arrangements with an owner of land, very important to their security that they should have all the rights of tenants, and when they obtain an instrument in the form of a lease, in very terms giving them a term, and fixing rent as such, there would seem to me no legal reason for saying the parties did not intend just what such terms express. And, therefore, when, upon the instrument itself, the parties have, in legal language, created a term in the land, it should, in accordance with the view expressed by KENT, Ch. J., in *Stewart v. Doughty*, be permitted to operate accordingly. But, on the other hand, where the terms employed indicate a hiring of person and team, &c., and an intent that the owner hold the title and possession of the land, and make compensation out of the product, let it operate accordingly.

The mere circumstance that the pecuniary result of complete conformance would be identical, is not a conclusive test of the intention of the parties. The intermediate and different incidental legal consequences of the two instruments

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may have been the great motive to the difference in their form, and presumptively have controlled the parties in their form. And, if a tenant will only commit himself to such an enterprise for a term of years, on condition that he shall have a legal estate in the land for the term, and that the owner of the fee shall look to the conditions of the lease and his covenants for his compensation for the use of the land as rent; and being of such mind he obtains from the owner an instrument in legal and apt terms to express that result,—why should not the instrument so operate? It is not a sufficient reason for denying such legal effect that another agreement, which is differently expressed, imports an intention to hire and pay for the work and labor.

Notwithstanding these suggestions, the balance of the authorities above cited seems to be, that, notwithstanding the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent but compensation for the use of the land, while the other portion is compensation to the occupier for his work, labor and services, &c.; and that the legal possession of the land is in the owner, and the two are tenants in common of the crop.

If this view be taken of the nature and intent of the agreement before us, what is the rule of damages for its breach?

It is settled that if there be an agreement to employ for a specified term and for a specified compensation, and the employer refuses to perform, he is liable to pay as damages the stipulated compensation for the full period, provided the proposed employee remains out of employment and in readiness to serve during the whole period. But, although he is *prima facie* entitled to the whole compensation, it is competent for the defendant to reduce the recovery by showing that the plaintiff earned something in other ways during the period, and it is said that such reduction may be insisted upon on proof by the defendant that the plaintiff had the opportunity to accept other employment of the same kind, in the same locality and refused. *Sedgwick on Damages*, 2 ed. 352, ch. 12;

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Costigan v. Mohawk & Hudson R. R. Co., 2 Den. 609, and cases cited; Heim v. Wolf, 1 E. D. Smith, 73.

But it is quite obvious that, if such be the rule, the party suing to recover his wages must wait until wages are due before he can recover them, and he can recover no more than have accrued. That is to say, the plaintiff can recover no more nor any faster than he would be entitled to receive if he had been employed. The employer will not be bound to pay the plaintiff for being idle more than he would pay him for rendering the service, and wages will accrue no faster to the plaintiff while idle than while employed, and, therefore, prospective wages cannot be recovered.

Can the rule of damages in such case be varied by declaring, not for wages as such, but for damages for denying to the plaintiff the opportunity to earn the wages? Doubtless the cause of action may be so dealt with, but that will not entitle the plaintiff to the stipulated compensation not yet accrued. *Non constat* whether the plaintiff may not in the future have employment which will be even more remunerative, and the plaintiff, by bringing his action immediately upon the refusal to employ, cannot practically deprive the defendant of the benefit of the reclamation or abatement for earnings which may be subsequently received from other sources. If the action be brought immediately, the plaintiff will, of course, be entitled to nominal damages, and it may be, under some circumstances, to special damages. But if he claims as damages the loss of the stipulated wages, he must wait until, but for the breach, he would have received them.

This is not, however, because he is not entitled to the benefit of his contract, nor because the whole value of the contract may not be recovered in a single action, and immediately upon the refusal of the defendant to perform; but because the whole wages do not represent the value of the contract. Presumptively the services which he does not render and which he can turn to other account are worth as much as the wages, and, therefore, so long as it is uncertain whether he will have other employment, it is impossible to tell what he has lost by the defendant's fault.

Now, if the contract which we have before set up was an

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agreement for a lease, the rule of damages usually applied to such agreements is, the difference between the rent the tenant agrees to pay and the annual value of the term, and special damages may be awarded also for expenses necessarily incurred, which, by reason of the disappointment, are lost. *Driggs v. Dwight*, 17 *Wend.* 71; *Giles v. O'Toole*, 4 *Barb.* 261; *Lawrence v. Wardwell*, 6 *Id.* 424.

But the conclusion above arrived at is, that under the authorities we cannot treat the present contract as an agreement for a lease, properly or technically so called.

And it has been seen that if the agreement be regarded as an agreement for services, the recovery would be the stipulated compensation up to the time of suit brought, subject to the right of the defendant to show earnings, or at least a refusal to earn during the same period or a portion thereof.

Obviously, if the rule of damages applicable to a mere hiring of services were to be applied to this case, the plaintiff, having brought suit immediately after the breach, could not claim, upon any facts proved, that anything in the nature of wages or compensation had accrued, or would have then accrued to him had the contract been performed.

Besides, he was not, except in a remote sense, servant. He would have sowed and planted and cultivated at his entire discretion, subject only to the rules of good husbandry. He would have supplied a portion of the seed; he would have found food, shelter and maintenance for stock furnished by himself, the growth and produce of which would have been his own; he would have become himself the employer of the servants out of whose labor he had the chance of profit; he would have had a home for his family, and a portion of the supplies for their use, and, finally, his settlement would have been in the nature of an accounting and distribution of the stock and profits. This, it is true, did not create a partnership in the usual sense of that word, and if it did not create the relation of landlord and tenant, it was certainly not a hiring upon wages, the benefit of which could only be derived from performance or from being out of employment.

In my judgment we are not put to the alternative of regarding the present agreement as either the one or the other, but

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may regard it as a special contract, partaking of some of the characteristics of both.

According to the above later cases, it is not a lease, nor an agreement for a lease, and the plaintiff would not have been a tenant, and yet he was not, and would not if he had entered into possession, have become the mere servant of the owner. Indeed, in *Walker v. Fitts*, 24 *Pick.* 191, in the supreme court of Massachusetts, where it is so uniformly held, that the occupier does not own the crops as tenant, rendering to the owner a portion as rent, but the two are tenants in common, Justice MORTON says: "The occupier is not a mere servant; it is not a contract of hire in which he receives compensation for services. It is not a mere license to enter and cultivate, nor a tenancy at will."—yet he says, "he had a right to occupy, and an interest in the land. The owner could not exclude him, nor maintain an action against him, for anything done in pursuance of the agreement."

In view of these observations, and in view also of the decisions above referred to, the learned justice did very pertinently add, "what the precise nature and character of his interest was, is not so easily determined."

It was, in view of the decisions, a special contract, partaking somewhat of the nature of an adventure, and entitling the party to the chance of profit or benefit derivable therefrom. On an agreement for wages, the court can declare, as matter of law, that if the party serve, he is entitled to the stipulated compensation.

If the amount be not fixed in the contract, then, what his services are worth. If he finds other employments they may be allowed in abatement.

Here the court cannot say, that, if the contract had been performed, he would have realized one dollar for his services; *non constat*, that the returns of the cultivation would have equaled his expenditure. It may be presumed that the earth will yield a reward to the husbandman: but, how large? That depends upon the details more or less contingent and speculative. And other contracts of the same nature, in the same place, calling for the same expenditure of time, labor,

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skill, assistance and other details, and upon a farm of the same precise character, may safely be said to be impossible.

To my mind the only rule which can be prescribed, and the only rule which will do justice to the parties is, that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it was broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it he must incur expense, perform labor, and submit to an appropriation of his stock. His damages are what he lost by being deprived of his chance of profit.

How then can the value of the contract be proved? If it cannot be proved, then the plaintiff can only recover nominal damages. I think the plaintiff is not without a better rule. The administration of justice frequently proceeds with reasonable certainty of accomplishing what is right, or as nearly right as human efforts may attain, in the face of similar difficulties, and it does so by making the experience of mankind, or, rather, the judgment which is founded upon such experience, the guide.

The question is like that of the market value of goods on a particular day; which becomes a test of damages, only as a means of judging how much one entitled thereto could have realized by a sale, and yet, numerous contingencies might have rendered it impossible to sell at that price, and other circumstances might render it grossly improbable that, if he had the goods, he would have sold them at that time. So when the damages for not executing a lease of a house are to be ascertained by proving the value of the lease at the rent reserved; and other cases are numerous, in which such value must be ascertained by resort to the judgment of men whose knowledge of the premises, and whose experience in the same or like matters, enables them to form a judgment on the subject.

It is quite true, that any opinion so expressed will be open to scrutiny; cross examination may draw out all the grounds of opinion, and may travel over all the causes of uncertainty and doubt above alluded to, even to the estimate in detail of all the possible results of working the farm, and its expenses and contingencies.

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It is also true that any such opinion must be formed, in view of all the various uncertainties attending the operation of working the farm, but it is a result based upon years of experience and observation, with knowledge of the farm itself, upon which the plaintiff must rely, to prove the value of his contract. How much is such a privilege (whether it be called a lease or right of occupation, or by whatever name) worth? Any answer to that question necessarily brings into the mind of any one proposing to buy the privilege, all that it will cost him in time, labor, money or other sacrifice to enter upon performance and perform the contract on his part, and also all the uncertainty as to the result in producing value to him in return.

Such a privilege may be worth nothing. It may be worth more than the labor and expense attending it. I think it is a proper subject for proof in that form.

According to these views, the question, whether or not the plaintiff hired another farm, and what it cost to remove to it, becomes irrelevant.

For these reasons I think the judgment should be reversed, and a new trial ordered, costs to abide the event.

The majority of the judges concurred in reversing the judgment, without, however, it was understood, passing on the question of the admissibility of the opinions of witnesses, to prove the value of the contract.

Judgment reversed, and new trial ordered, costs to abide event.

TAYLOR v. ROOT.

December, 1868.

In an action by several plaintiffs, on a contract, for an accounting, if the contract itself divides the fund, and makes a specific share due to each, a cause of action in favor of the defendants against one of the plaintiffs, though it could not be set up to bar the right to an accounting, is a proper counter-claim against the share of the plaintiff whom it affects.

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In such a case the claim of the plaintiffs is several, within the meaning of the Code.

A judgment, even though recovered in an action of tort, is a contract, within the provisions of the Code allowing a claim on contract to be set up as a counter-claim, in any action on contract.*

The original cause of action is merged in the judgment.

Thomas D. Taylor and others sued Russell C. Root in the supreme court, in 1861, for an accounting in reference to the profits of a joint publication.

In 1857 the parties undertook the publication of a *Marine Register*, and supplements. Plaintiffs were to furnish the reports and all other matter for publication; and defendants were to print, publish, deliver the the work, collect the subscriptions, pay expenses, and to account annually as follows:

"The remainder or net proceeds . . . shall be divided in five equal parts, two of which shall be retained and become the property of the said R. C. R. A. & Co. (the defendants), and one of the remaining three parts shall be paid by the said R. C. R. A. & Co. (the defendants) in cash to each of the other parties to this agreement" (the plaintiffs).

The answer set up two defenses.

1. It averred that another action was pending in the same court, between the same parties, and for the same cause.

2. It set up as a ground of counter-claim or set-off, a judgment recovered by the defendant Root, against the plaintiff Hartshorne, and assigned by Root to all the defendants, before the present action was commenced.

The referee held that the pendency of the other action was not a bar, and that the judgment alleged, having in fact been recovered in an action for slander, was not available as a set-off; and accordingly he stated the account and gave judgment for the plaintiffs.

The supreme court affirmed the judgment, and defendants appealed, and the question in this court was, whether the counter-claim was admissible, and this turned on the question

* On this point the authority of this case must be deemed shaken by *McCoun v. N. Y. Central, &c. R. R. Co.*, 50 *N. Y.* 176.

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whether a judgment recovered for damages for a tort, is "a contract," within the provisions of the Code as to counter-claim.

John H. Reynolds, for defendants, appellants.

John B. Staples, for plaintiffs, respondents.

BY THE COURT.—WOODRUFF, J.—1. The agreement, set forth in the complaint herein as the foundation of the action, required the defendants to divide the net proceeds of the publication of the New York Register, &c., into five parts. Two of these parts the defendants were to retain to themselves, and one of the remaining three parts they were to pay to each of the plaintiffs.

The plaintiffs were entitled to an accounting; but although they joined in an action to compel the defendants to render an account, they could not thereby change the several nature of their respective claims to payment. When the amount of net proceeds was ascertained or admitted, each plaintiff was entitled to an equal one-fifth part thereof; and a judgment declaring the several amounts due to each plaintiff, from the defendants, would have been legal and appropriate.

Hence, as to either of the plaintiffs, if the defendants had averred and proved payment in full of his share of such proceeds, the defense, as to such plaintiff, would have been effectual to prevent a recovery, and yet the other two plaintiffs would have been entitled to judgment for the several amounts of their shares.

For example, suppose the defendant's answer had admitted the liability to account,—admitted the amount of the net proceeds, and the amount of each share of one-fifth,—claimed to retain two shares,—admitted that one share was due to each of certain two of the plaintiffs,—but, as to the other plaintiff, averred that the defendants had paid to him his share in full. This would, as to such last named plaintiff, have been a defense, and if proved, would have prevented his recovery.

The same principle is applicable to a defense in the nature of a set-off or counter-claim under our Code of Procedure.

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By section 150, a counter-claim must be one, existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action.

As in the case of payment to one of the plaintiffs of his share in full or in part, the judgment might properly be several in respect to the amounts to be paid to the other two plaintiffs, or in respect of a balance, if any, due to the third, so in the case of a counter-claim in favor of the defendants against either of the several plaintiffs.

The plaintiffs' claim is undoubtedly correct, that where the cause of action is strictly joint, and the recovery, if had, is for the joint benefit of the plaintiffs; as for example, where the plaintiffs are partners, asserting the right of the copartnership firm as such to recover, and like cases,—in which it would be wholly incompetent for the defendants to enter into any attempt to state the accounts between the plaintiffs, to ascertain what portion of the recovery would ultimately inure to the benefit of each—the defendants could not set-off or counter-claim the individual debt of either plaintiff to defeat or reduce a joint recovery; nor here, could the separate or individual debt of either be set up as a set-off or counter-claim to affect the several right of the other plaintiffs to an accounting, or to defeat or diminish their recovery of the several amounts of the share due to each of them.

But where, by the contract itself, the fund is divided, and one share, specifically mentioned, is due to each, so that allowing the set-off as to one only, affects the judgment as between him and the defendants, and in no wise affects the recovery in favor of the others for the full share due to each, then the claim of the plaintiffs is several within the meaning of the section of the Code referred to, and a set-off or counter-claim is expressly allowed. A judgment declaring their separate or several rights is proper. No accounting between the plaintiffs to settle their respective interest in the proceeds is required, nor could it be allowed to affect the rights of the defendants as against each plaintiff; the plaintiffs' interests are expressly defined and declared in the agreement upon which the action is founded, viz., one-fifth to each.

The question here is, not whether the right to an account is
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strictly joint, nor whether the defendants could have been subjected to three separate actions to compel an accounting to each plaintiff. If it be conceded, for the purposes of this appeal, that the plaintiffs could join, as they did, in bringing the action, or conceding, even further, that they must join, it still remains true that the judgment will appropriately award to the plaintiffs, severally, each one-fifth part of the proceeds ascertained thereby; and payment to either plaintiff would defeat his claim and leave the others to have judgment awarding to each of them his share; and a set-off or counter-claim would have its several operation in like manner.

II. If, then, the claim of the defendants against the plaintiff, Hartshorne, was one which, within the provisions of the Code, was a proper subject of counter-claim, the referee erred in rejecting it, when he should have allowed it against the one-fifth of the proceeds which the defendants had agreed to pay to Hartshorne.

The claim was a judgment against the plaintiff, Hartshorne, recovered, assigned to and held by the defendants before the commencement of this action.

The Code of Procedure, in declaring what may be allowed as a counter-claim, provides that a defendant may set up, "in an action on contract, any other *cause of action* arising *also on contract*, and existing at the commencement of the action."

It appears by the case, that the referee rejected the defendants' claim, on the ground that the judgment held by them against Hartshorne, was recovered in an action "founded *not on contract* but *on tort*, being for slanderous words spoken by the said Hartshorne," of and concerning the plaintiff therein.

This was erroneous. The nature of the action wherein the judgment was recovered, and the cause thereof, were wholly immaterial, and in no manner affected the right of counter-claim; the error of the referee either proceeded from a misapprehension of the meaning of the section above cited, or it overlooked the elementary definitions in the law of contracts.

Contracts are of three kinds: simple contracts, contracts by

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specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract (See *Blackstone, Chitty, Addison, Story, Parsons*, or any other elementary writer on contracts). The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on contract. It is strictly an action *ex contractu*, if suit is brought thereon; it is no less *ex contractu* when set up as a counter-claim.

For this error of the referee, the judgment must be reversed, and a new trial ordered, that the counter-claim may be allowed.

All of the judges but HUNT, Ch. J., and CLERKE, J., concurred.

Judgment reversed, and new trial ordered, costs to abide event.

THATCHER v. CANDEE.

September, 1886.

A trustee cannot divest himself of the obligation to perform the duties of his trust, without an order of the court, or the consent of all the *cestuis que trust*.

Trustees must all unite in bringing an action on behalf of the estate.

Andrew Thatcher and Nanning Marselis (the latter of whom died pending the action) sued William L. Candee in the supreme court. Their complaint alleged the following matters: About June 31, 1838, one John Hagaman, for the purpose of applying his property, real and personal, to pay his debts, conveyed specified real estate to plaintiffs and David W. Candee and

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Francis Hagaman, and at the same time assigned his personal property to the same persons, both grants being upon trust to pay his debts in a certain order. On April 10, 1838, the defendant having purchased the real estate at public sale for three thousand and twenty dollars, and the incumbrances thereon, and being obliged by the terms of sale to advance one-fourth part of the said sum, and to pay the balance in three equal annual payments, to be applied to the discharge of the debts due from the said John Hagaman, according to the terms of the assignment, it was agreed between the assignees and defendant, upon condition that defendant should pay one thousand dollars, that the balance should not be demanded of him until he was able to effect a sale of some part or the whole of the said property, and that any available means arising out of said property should be applied to the discharge of any judgments against the said property for which the trustees were personally liable, which judgments amounted to one thousand three hundred and twenty-one dollars, and that upon defendant's binding himself to perform the agreement, the assignees would deliver to him a deed of the property. Francis Hagaman, one of the assignees, died in 1843, and in 1846, the surviving assignees executed a conveyance of the land to defendant. David W. Candee, another assignee, assigned all his right, title, and interest in the trust estate to the two remaining assignees, the plaintiffs, and renounced his right to act, by a writing dated in 1848.

Defendant received large sums of money for portions of the said real estate, of which he sold more than sufficient to pay the purchase money and the judgments for which the assignees were personally liable, but did not pay the judgments.

The relief demanded was for the purchase money, (in sums above stated), and the payment of the judgments, for which the trustees were liable, with interest and costs, and that the amount be declared a specific lien on the real estate, or on so much of it as the defendant had not conveyed. Defendant demurred on the grounds: 1. That David W. Candee should have been made a party plaintiff; 2. Several causes of action were improperly joined; and, 3. The complaint did not state facts sufficient to constitute a cause of action.

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The supreme court at special term sustained the demurrer on the ground that David W. Candee should have been made a party plaintiff, holding that David W. Candee had not, by his renunciation of the trust, and assignment to Thatcher and Marselis, deprived himself of the right to sue on this agreement made by defendant. The court at general term affirmed the decision, assigning the further reason that a trustee, after accepting a trust, could not, by his own act, divest himself of his trusteeship. Plaintiffs appealed.

D. P. Corey, for plaintiff appellant, Cited *Wallace v. Eaton*, 5 *How. Pr.* 99; *Sheldon v. Wood*, 2 *Bosw.* 267; *Story Eq. Pl.* §§ 81, 144, 147; 147 *Ambler*, 11 *Ves.* 429; *Elmendorf v. Taylor*, 10 *Wheat.* 152; *Spicer v. Hunter*, 14 *Abb. Pr.* 4.

S. W. Jackson, for defendant respondent, Cited *Shepherd v. McEvers*, 4 *Johns. Ch.* 136; *Cruger v. Halliday*, 11 *Paige*, 319; *Ridgeley v. Johnson*, 11 *Barb.* 527; *Hill on Trustees*, 180.

LEONARD, J.—The inquiry raised by the last objection, it seems unnecessary to discuss. The counsel for the defendant has made no point in respect to it, and there can be no doubt that the facts stated do constitute a cause of action.

The defendant insists that there is an improper joinder of actions, because, as he supposes, the demand of one thousand three hundred and twenty-one dollars arises for a sum due to Thatcher and Marselis, for money paid by them to satisfy certain judgments upon the real estate sold, for which they had become personally responsible, while the demand for three thousand and twenty dollars arises from the price of the land sold, which is due to the assignees in their representative capacity.

The complaint states the agreement of the defendant with the four assignees to pay a certain amount of judgments which were liens upon the land sold. It is also stated in the agreement, and in the complaint, that the assignees had become personally responsible for these judgments; and it is also stated that Thatcher and Marselis have paid the amount; but these latter statements are not necessary to the complaint, and may be disregarded. The fact that the defendant agreed with the assignees, to pay these sums and has not done so, is fully stated. This demand arises, not from the payment of these

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sums by Thatcher and Marselis, but upon the contract of the defendant with the assignees. The payment by the assignees creates no liability on the part of the defendant, and is stated, perhaps, for the purpose of raising an additional equity against the defendant, but not for the purpose of creating a cause of action in favor of Thatcher and Marselis personally. The defendant distinctly agreed and bound himself to pay these sums out of the proceeds of sales, and the obligation arose in favor of the assignees as soon as he had received a sufficient sum from the sales for that purpose. The receipt of a sufficient sum is averred, and a cause of action in favor of the assignees, in their representative capacity, appears to be fully stated.

The remaining objection is of a more serious character. Unless one of several co-trustees can, by his own acts, relieve himself from the responsibility of a trust, once accepted and for some time voluntarily acted upon, there is a defect of parties by reason of the non-joinder of David W. Candee. The fact stated in the complaint, which is supposed to excuse the non-joinder, is the assignment by Candee of his interest in the estate to the other assignees, and his renunciation of the right to act. There is no statement of his death, or of any disability, or of an accounting and discharge by the court. We are to assume that no such facts exist. Nor has the plaintiff brought himself within the rule permitting a necessary party to an action to be made a defendant where he has been requested, but has refused, to unite as a plaintiff in its prosecution.

The authorities are clear that a trustee cannot divest himself of the obligation to perform the duties of the trust without an order of the court or the consent of all the *cestuis que trust*. *Shepherd v. McEvers*, 4 *Johns. Ch.* 136; *Cruger v. Halliday*, 11 *Paige*, 314, 319; *Ridgeley v. Johnson*, 11 *Bark.* 527. These authorities are sufficient to establish that D. W. Candee is a trustee, notwithstanding his assignment and disclaimer.

Trustees cannot act separately; all must unite. They constitute in law but one person, and must join in bringing an action. *Brinckerhoff v. Wemple*, 1 *Wend.*, 470. Thatcher and Marselis have no authority to exclude their co-trustee.

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D. W. Candee, from acting with them, by reason of anything stated in the complaint. The judgment, if recovered in this action, would be no discharge to the defendant as against the creditors of the assignor, John Hagaman.

The judgment should be affirmed with costs, with leave to the plaintiff to amend upon payment to the defendant of the costs of the demurrer awarded at special term, and the costs of the appeal to the general term of the supreme court and of the appeal to this court, in twenty days after adjustment.

The amendment should be allowed in view of the probable running of the statute of limitations, should the plaintiff be put to another action.

All the judges concurred.

Judgment affirmed, with costs, with leave to plaintiff to amend, upon payment to the defendant of the costs of the demurrer, awarded at special term and the costs, of the appeal to the general term of the supreme court, and of the appeal to this court, in twenty days after their adjustment.

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December, 1869.

Affirming 46 Barb. 243.

In the absence of fraud or collusion between the administrator and the creditor, a surrogate's decree, directing the administrator to pay a debt, is conclusive on the sureties in the administration bond.

After the liability of the sureties is fixed, the bond may be assigned to the creditor, and he may maintain an action thereon.

Benjamin C. Thayer brought this action, July 30, 1863, in the supreme court, against Sidney Allen, Alvah Phelps, Jacob Loomis and Albert Clark, upon a bond executed by them February 23, 1858, and conditioned for the faithful discharge, by the defendant Allen, of the duties of administrator of the estate of Nahum Allen, deceased intestate, and for his obedience of all orders of the surrogate touching the administration.

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The plaintiff had recovered three several judgments against Allen and Phelps as administrators. Subsequently, on September 30, 1862, and more than six months after the issuing of letters of administration, the surrogate upon application of the plaintiff ordered Allen and Phelps as administrators to pay the plaintiff within five days thereafter the amount of the judgments, with costs and disbursements of the application.

Evidence was adduced on the trial of this action, to show that the decree of the surrogate was docketed, and that execution issued thereon was returned unsatisfied. The decree set forth that assets were proved in the hands of the administrators sufficient to pay all claims against the estate of the deceased.

Allen and Phelps having omitted to pay, the surrogate, on January 7, 1863, made a decree assigning the bond on which this action is brought, to the plaintiff to be prosecuted.

The referee, moreover, found for the plaintiff, in the sum of two thousand two hundred and eighty-one dollars and six cents, being the amount of the judgments before recovered, costs in the proceedings thereon before the surrogate, and disbursements in those proceedings, with interest on these several items; and judgment was entered, accordingly.

The supreme court, at general term, upon appeal, held, in an opinion by INGRAHAM, J., that the decree of the surrogate was conclusive upon the administrators. Any defense in their behalf should have been urged before him. Under such a bond as they had executed, it was not competent to show that his decree was erroneous, and the neglect to comply with its requirements forfeited the bond. There can be no doubt as to the power of the surrogate to decree payment of a debt against an administrator after the lapse of six months from the granting of letters of administration. 3 R. S. 5 ed. p. 204. The surrogate could prosecute the bond under the former provisions of the revised statutes (*Id.* § 19), and now can assign it to the creditor for that purpose. Act of 1837, c. 460, §§ 63, 64, and 65. The plaintiff could not be relegated to a general accounting, upon which to share equally with the other creditors.

The defendant appealed to this court.

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F. G. Young, with him *J. W. Edmonds*, for the defendant, appellant.—The Revised Statutes abrogated the preference to be obtained by the creditor first issuing execution. *Dudley v. Griswold*, 2 *Bradf.* 30; *People v. Albany*, 9 *Wend.* 488; *Dox v. Backenstose*, 12 *Wend.* 542. The surrogate can have a final accounting, 2 *Ed. Stat. at L.* p. 94, § 52; p. 96, § 61; p. 98, § 70; p. 120, § 18; p. 229, § 1. The only means of enforcing which is by attachment. 2 *Ed. Stat. at L.* p. 230, § 6; *Dakin v. Hudson*, 6 *Cow.* 224; *Seaman v. Duryea*, 11 *N. Y.* 324; *S. C.* 10 *Barb.* 528. The provisions for suing on administrator's bond (*above*) were only to enforce decrees on final accounting.

Sureties without notice of the suit are not concluded by a judgment. *Thomas v. Hubbell*, (*above*); *Tyler v. Ulmer*, 12 *Mass.* 166; 1 *Greenl. Ev.* §§ 522, 523, 535; *Westervelt v. Smith*, 2 *Duer*, 449; *Turpin v. Thomas*, 2 *Hen. & M.* 139, 147; 2 *Cow. & H. Notes to Phil. Ev.* 816, 817; *Id.* 281; *Ford v. Walsworth*, 15 *Wend.* 449; *Dakin v. Hudson* (*above*); 2 *R. S.* p. 91, § 65; *Id.* p. 116, § 21; *Simkins v. Cobb*, 2 *Bail. (So. Car.)* 60; *Weston v. Weston*, 14 *Johns.* 428. Evidence rejected would have shown that the bills rendered to the administrators varied from those sued on; that in one of the suits no process was served on them, but an attorney appeared voluntarily for them, without authority. Such appearance, without authority shown, is not binding. *Campbell v. Bristol*, 19 *Wend.* 101; *Allen v. Stone*, 10 *Barb.* 547. Costs were taxed by consent of the attorneys and by award of the referee, not by an award of the court. 2 *R. S.* p. 90, § 41; 2 *Ed. Stat. at L.* 92; *Buckhout v. Hunt*, 16 *How. Pr.* 408.

Benjamin C. Thayer, plaintiff, respondent, in person.—The surrogate has power to order the payment of any debt by the administrator after six months from the granting of letters. *Fitzpatrick v. Brady*, 6 *Hill*, 582; *Kidd v. Chapman*, 2 *Barb. Ch.* 424; *Magee v. Vedder*, 6 *Barb.* 356; *Mount v. Mitchell*, 31 *N. Y.* 356, 363. The debts were established by judgments of the supreme court, and no anterior matter of defense can be shown. *Biddle v. Wilkins*, 1 *Pet.* 686. Being only collaterally considered they must be taken to be regular. *Rutherford v.*

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Rutherford, 1 *Den.* 33. The surrogate had full jurisdiction to pass upon the debts. *People v. Downing*, 4 *Sandf.* 189; *Baggott v. Boulger*, 2 *Duer*, 160, 169. The surrogate's decree concluded the administrators and therefore the sureties. *People v. Laws*, 3 *Abb. Pr.* 450; S. C., affirmed, 4 *Abb. Pr.* 292; 4 *Bosw.* 379; and cases there cited; *Vanderpoel v. Van Valkenburgh*, 6 *N. Y.* 190; *Dyckman v. Mayor*, 5 *N. Y.* 434; *Bumstead v. Read*, 31 *Barb.* 661; *Thomas v. Hubbell*, 15 *N. Y.* 405; *Annett v. Terry*, 35 *N. Y.* 256, 260, 261. The surrogate can assign the administrator's bond, if execution is returned unsatisfied. *Dayton's Surrogate*, ed. of 1855, p. 29, note a; 1 *Duer*, 698. The statute of 1837 (cited in the supreme court, *above*), is cumulative in its effect, and leaves pre-existing remedies. *People v. Guild*, 4 *Den.* 551. The real party in interest is now to sue, not the obligee of the bond. 2 *Duer*, 170.

BY THE COURT.—WOODRUFF, J.—It seems to me necessary to say little more in this case, than that I concur in the opinion, pronounced by INGRAHAM, J., in the court below, that in the absence of fraud or collusion between the administrator and the creditor, a decree of the surrogate, directing such administrator to pay the debt, is conclusive upon the sureties in the administration bond. By that bond, the latter undertook that the administrator should obey all orders of the surrogate, touching the administration of the estate committed to him.

Within the letter of the bond a breach of the condition has occurred, and the absolute undertaking of the sureties has become operative.

It may be considered, nevertheless, that a disobedience to an order or decree of the surrogate, which he had no jurisdiction to make, would not furnish a ground of recovery. And inasmuch as fraud vitiates judgments and decrees, as well as all other acts and transactions induced thereby, it follows that a decree of the surrogate, obtained by fraud or collusion, would not conclude such sureties.

But the statute gave the surrogate jurisdiction, upon the application of a creditor, to decree the payment of any debt

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after the lapse of six months from the granting of letters of administration.

The surrogate therefore had jurisdiction; application was made to him, he found that there were assets sufficient, and he decreed the payment.

The statute further provides, that whenever the administrator refuses or omits to perform a decree of the surrogate, for the payment of a debt, such surrogate may cause the bond to be prosecuted, and shall apply the moneys collected thereon to the satisfaction of the decree.

The order or decree of the surrogate was therefore within his jurisdiction.

No offer or attempt was made on the trial herein to show fraud or collusion, but only to impeach the judgments in favor of the plaintiff which were mentioned in the decree, and which the administrator was therein ordered to pay, by showing that they were irregular and erroneous, and that the debts for which they were recovered, or some part thereof, had been paid before they were rendered.

This is an attempt at a double impeachment of the record.
1st. To inquire into the merits of the decree of the surrogate.
2nd. To inquire into the merits of a judgment duly obtained in the supreme court, which the decree of the surrogate directed the administrator to pay.

The case of *Annett v. Terry*, in this court (35 *N. Y.* 256), shows that this cannot be done, while on the other hand it holds that the decree of the surrogate may be impeached by the sureties for fraud, or collusion in the procurement thereof.

Whether the proceeding further pursued by the creditor, to wit, by filing the decree of the surrogate, and issuing execution against the administrators, and procuring and proving the return thereof, was an essential pre-requisite to the maintenance of this action, is not material to the present inquiry. It was evidence of the default of the administrator at least. If a necessary condition of the liability of the sureties it was satisfied, and if not the sureties were not prejudiced thereby.

The case of *Douglass v. Howland* 24 *Wend.* 35, 55; as also, *Thomas v. Hubbell*, 15 *N. Y.* 405, may be profitably referred to, to show the distinction between those cases in which (in

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the absence of fraud) a judgment or decree against the principal concludes the sureties, and those in which it does not. See also *Cowen & Hill's Notes to 1 Phil. Ev.* notes 620 693, pp. 894, 984, &c.

These views preclude inquiry into the alleged errors in the judgments which the surrogate ordered paid, and lead to the conclusion that the judgment appealed from should be affirmed.

MURRAY, J., also read an opinion for affirmance.

All the judges concurred.

Judgment affirmed, with costs.

THERASSON vs. PETERSON.

September, 1866.

Defendants, being insolvent, agreed with plaintiffs and certain other creditors, to transfer property consisting of stock in trade and book accounts of uncertain value, to trustees, to dispose of it and pay all their debts *pro rata*, and plaintiffs agreed, in consideration of defendants making such transfer, to release them from all indebtedness. Defendants performed their part of the agreement, and put the trustees in possession of the property. *Held*, these facts, without proof that plaintiffs accepted the assignment, constituted an accord and satisfaction, and were a defense to an action by plaintiffs on the original indebtedness.

Louis F. Therasson and another, sued George F. Peterson and George S. Humphrey, in the supreme court, on a promissory note, made by defendants under their firm name of Peterson & Humphrey.

In the latter part of February, 1857, defendants were copartners in business, and insolvent. Their indebtedness was some eighty thousand dollars, and their assets consisted of a stock of goods and book accounts, the real value of both of which was uncertain. They disclosed the condition of the firm to three of their principal creditors, and, upon consultation with their creditors, it was deemed best for all parties that defendants should

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forthwith assign^o and deliver their property to their creditors in satisfaction of their debts. The suggestion of this plan came from one of the consulting creditors, who drew up the form of a proposal to be signed by the defendants, and an acceptance to be signed by their creditors. The proposal, as signed by the defendants (after reciting the embarrassed condition of copartnership affairs), was in this form: "We hereby propose that in case our creditors will grant us a release, we will surrender into the hands of William G. Lambert, William C. Haggarty, and William M. Bliss, in trust for our creditors, all our stock of goods, debts due to us, whether by note or book account, and all other copartnership property of every name and description, only reserving to ourselves the sum of one thousand dollars to each of us, to provide for our personal debts and to cover our personal expenses, until we are enabled to make other business arrangements, the property so conveyed in trust to be disposed of as the trustees may deem most for the interest of all concerned, and the proceeds to be divided among all our creditors *pro rata*, and without preference, except for such amounts as are covered by collateral securities already pledged."

The acceptance, which was signed by plaintiffs and some fifty other creditors (some eight or ten, for small amounts, as it appeared, not signing it), was as follows: "We, the undersigned, creditors of the firm of Peterson & Humphrey, of the city of New York, agree to accept the foregoing proposition, and to grant them the release they ask, upon the conditions named; and the conveyance in trust of their property for the purposes specified, we hereby agree shall be a release and discharge in full of their indebtedness to us."

On March 7, following, the defendants executed an assignment to the persons named in the proposal, of "all their partnership property and effects, whatsoever and wheresoever, real and personal, including cash on hand, stock in trade, store fixtures and furniture, the lease of store No. 524 Broadway, and all notes, bills, accounts, and balances of account, and other choses in action, owing or in any way belonging to them, excepting and reserving, by consent of the creditors heretofore given, one thousand dollars to said Peterson, and one thousand dollars to said Humphrey, to be paid them by the said

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trustees out of the trust funds, in sums and at times at the discretion of the trustees. To have and to hold, &c., forever, upon trust nevertheless, and to and for the uses following, namely: To convert the same into cash without unnecessary delay, and to apply the proceeds thereof, after paying the lawful expenses of the trust hereby created, to the payment of all the debts of our said firm in equal ratable proportion, until the same shall be paid in full, or, as far as said proceeds will go." Upon the execution and delivery of the deed of assignment, the trustees named therein took possession of all the assigned property, and executed the trusts therein contained.

The supreme court gave judgment for defendants, and this was affirmed at general term.

Samuel Hand, for plaintiffs, appellants.—Plaintiffs were entitled to judgment, and the court should have so directed. *Goelet v. Ross*, 15 *Abb. Pr.* 251; *People v. Board of Police*, 35 *Barb.* 651. The paper signed by plaintiffs was void for want of consideration. It was not under seal, and was without consideration, all the creditors of the defendants not having signed it. *Fellows v. Stevens*, 24 *Wend.* 299; *Boothly v. Snowden*, 2 *Cowp.* 175; *Acker v. Phoenix*, 4 *Paige*, 305. The transaction was not good as an accord and satisfaction, for here was no satisfaction. *Dolsen v. Arnold*, 10 *How. Pr.* 528; *Tilton v. Alcott*, 16 *Barb.* 598; *Hawley v. Foote*, 19 *Wend.* 516. The agreement of plaintiffs was to grant defendants the release upon the conditions named in the proposal. The future transfer by defendants to the assignees was what plaintiffs agreed to receive as satisfaction of their claims. This assignment they must accept to make it a good accord and satisfaction. Until then, all defendants have proved is a mere executory agreement upon plaintiffs' part, not followed by any act of acceptance of the satisfaction tendered by plaintiffs.

James C. Carter, for defendants, respondents.—The facts proved constituted a complete defense. Before the agreement was executed by the making of an assignment, the assignment was in the nature of a composition. After being executed by the making of the assignment and the delivery of the property,

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it was a full accord and satisfaction. *Boyd v. Hind*, 40 *E. L. & E.* 428; *Norman v. Thompson*, 4 *Exch.* 755. The true rule in respect to accord and satisfaction is, that when the debtor has done all that the creditor has agreed to accept in satisfaction of the pre-existing obligations, the accord is sufficiently executed. *Babcock v. Hawkins*, 23 *Vt.* 561; 2 *Pars. on Cont.* 193, 131, notes *n, z*. The authorities to show that the defense was well pleaded, are conclusive. *Watkinson v. Inglesby*, 5 *Johns.* 386; *Eaton v. Lincoln*, 13 *Mass.* 424.

BY THE COURT.—WRIGHT, J. [After reciting the facts, and observing that no question of fraud was available.]—The sole point is, whether the matters alleged in the defendants' answer,* and proved on the trial, were a defense to the action.

I am of the opinion that the transaction was good as an accord and satisfaction. The defendants were in an insolvent condition, and unable to meet their debts as they matured, but had a large amount of property on hand of uncertain value. Under these circumstances an agreement was entered into between them and certain of their creditors, among whom were the plaintiffs, whereby the said creditors, in consideration that the defendants would transfer, surrender and convey to three persons named as trustees, all their copartnership property of every name and description (except the sum of one thousand dollars to each of the defendants to provide for their personal debts), in trust, that the said trustees should dispose of the same as they should deem most for the interest of all concerned, and dispose of the proceeds of the property so as to be conveyed equally among all the creditors of the defendants, without preference, except for such amounts as were covered by collateral securities already pledged, agreed to release and discharge the defendants from all and every debt or indebtedness due and owing, or about to be due and owing, from the defendants to them respectively. The defendants fully performed the agreement on their part, by making the assignment

* The original answer pleaded the facts as a release, but on the trial, and before the proofs were put in, defendants were allowed to amend and plead the same facts as an accord and satisfaction.

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to the persons named, and actually putting the property in the possession of the trustees.

This was a valid agreement of accord as between the parties to it. But it is claimed to have been an accord executory merely. The future transfer by the defendants to the assignees, it is said, is what the plaintiffs agreed to receive in satisfaction of their claims, and this assignment they must accept to make it a good accord and satisfaction. That until then, all the defendants have proved is a mere executory agreement upon the part of the plaintiffs, not followed by any act of acceptance of the satisfaction tendered by the plaintiffs. I am not prepared to adopt this view. On the contrary, I think the true view of the transaction, is, that before the agreement was executed by the making of an assignment, the assignment was in the nature of a composition. After being executed by the making of the assignment and the delivery of the property, it was a full accord and satisfaction. The true rule in respect to accord and satisfaction is, that when the debtor has done all that the creditor has agreed to accept in satisfaction of the pre-existing obligation, the accord is sufficiently executed. I am for affirmance of the judgment.

All the judges concurred, except PORTER, J., not voting.

Judgment affirmed, with costs.



THOMPSON v. MENCK.

December, 1865.

Reversing 23 How. Pr. 431.

This court will not direct the court below to amend its order by reversing the findings of fact, though it appears from the opinion of the court below, that it was the *intention* to reverse those findings, if the order of reversal fails to express that intent.

Where an agent or carrier was authorized to receive merchandise to transport to the buyer, delivery by his direction on board the barge of another person, was held sufficient to charge the purchaser. After verbal negotiations, defendant wrote to plaintiff referring to the

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merchandise as having been bought of him, and directing a delivery. *Held*, that this being accepted by plaintiff, was a sufficient contract within the statute.

Deceptive conduct in obtaining part payment of a debt already due, is deemed no defense to an action for the balance.

Reuben R. Thompson sued William Menck in the supreme court to recover money due on a sale of goods.

In March, 1856, while the river was closed with ice, the defendant called upon the plaintiff at Albany, and agreed with him for the purchase of such bones and fine black, or animal charcoal, as he (plaintiff), might have at the opening of navigation. The goods were to be delivered at the plaintiff's dock, in the city of Albany, and paid for in cash on delivery. At the time of such purchase, defendant informed plaintiff that Mr. C. N. Warner would ship the goods for defendant, and that plaintiff should deliver them to said Warner. Subsequently, about April 16, 1856, the defendant wrote to the plaintiff, directing him to deliver the goods to Mr. Warner. A day or two before the delivery hereinafter mentioned, Mr. Warner called at plaintiff's warehouse, and directed the foreman of the plaintiff to tell plaintiff to put the goods on board Captain Casey's barge. Mr. Warner also gave plaintiff in person the same directions. According to such directions, the plaintiff delivered on board said barge, at his dock in Albany, bones, &c., amounting at the prices agreed upon to nine hundred and sixty-one dollars and sixty-one cents. After such delivery, the defendant paid the plaintiff nine hundred dollars on account. The barge having on board the goods was sunk at New York.

The referee having found these facts, decided :

That C. N. Warner was the authorized agent of defendant to receive the goods in question.

That the defendant's direction to put the goods aboard Warner's barge was complied with by the delivery of the same on board Casey's barge, according to the directions of Warner.

That upon such delivery a valid contract of sale was consummated, upon the terms and at the prices previously agreed upon ; and the property of the goods and possession of the same, became thereby vested in the defendant.

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That the defendant became liable to pay the prices agreed upon as soon as the goods were delivered on board of Casey's barge.

Judgment was entered on the report of the referee in favor of the plaintiff, for the balance due, being sixty-one dollars and sixty-one cents, with interest and costs.

The supreme court, at general term, reversed this judgment on appeal, and a new trial was ordered. It did not appear by the order or judgment that the reversal was on questions of fact, although this was indicated by the opinion delivered at the general term. Reported in 22 *How. Pr.* 431. Plaintiff appealed.

John H. Reynolds, for plaintiff, appellant.

F. W. Burke, for defendant, respondent.

BY THE COURT.—POTTER, J.—It was not stated in the judgment or order of reversal of the general term, that the judgment on the report of the referee was reversed on the questions of fact. Section 268 of the Code declares: "that it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal." This court cannot avoid this statute, how much soever they might be impressed with the injustice of the finding of the facts below. We have so distinctly held, twice during this year, and have denied two motions for leave to send the case back, that the court below might amend their judgment or order, by reversing the findings of facts. The motions were made upon the ground, that from the opinion of the general term, it was clear that the court intended to reverse the facts, but that the order of reversal did not so express that intent. *Crocker v. Crocker* was one case.

It is clear, beyond question, that, upon the facts found by the referee, the plaintiff is entitled to recover, if the delivery was to be made at Albany, and was so made, and the goods sold were to be paid for on delivery. This the referee has expressly found in his facts; and though, in looking at the

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evidence, we might wish he had found some of the facts otherwise than he did, and though the general term, by an exercise of their power, might have reversed these findings of fact if contrary to their judgment, it is certain we cannot do so; we cannot repeal the statute in order to work out justice in that way.

The supreme court seem to have based their reversal upon the theory that the negotiation between the parties at Albany, in March or April, 1856, did not make a legal contract within the statute of frauds. I concur with them in that opinion. The referee has not found (as has been assumed), that it did. It is useless, therefore, to spend either time or argument upon that proposition; it is not a question in the case.

It cannot be denied, however, that there was a verbal negotiation and an agreement in March or April, at Albany, between the parties, in relation to the purchase and sale of these bones; that the parties agreed upon the price per ton, delivered on the dock at Albany; that there was an offer, and an acceptance; that the plaintiff made a pencil memorandum of it on a card; and that the defendant said, "all right;" and that the defendant directed the delivery to Mr. Warner, whom he had hired to freight them down the river. True, this memorandum was not signed by the defendant; that no money was paid; that the river was then frozen, and no actual delivery, and no valid and binding bargain, was then made; but, on the 16th of April, the defendant wrote the plaintiff in relation to this agreement, and adopting it in writing, in the words following:

"R. R. THOMPSON, Esq., Albany.

Dear Sir: I had a letter from Mr. Warner to-day, informing me that he would bring down the bones *which I bought of you*, at ten shillings per ton, and I wrote him to bring them. You will therefore please deliver them to him, as also the fine black, whatever you may have, and oblige,

"Yours truly, WILLIAM MENCK."

Here, at least, is the defendant's consummation, in writing, of the verbal contract made before in March or April. This was sufficient to make a good contract within the statute of

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frauds. At all events, if what before had transpired was not binding, here was a written proposition to be accepted by the plaintiff, the terms of which could be explained by the previous negotiation, and time was therein given the plaintiff for his acceptance, until Warner should be ready to take the delivery and transport the bones. And it was accepted; and it cannot be questioned, as sound law, that if the plaintiff did accept this written proposition, which itself refers to the previous agreement and calls it a sale, for he adopts it, and says, "the bones *which I bought of you*," and if he did deliver the bones as directed in that letter, it was a good acceptance, and constituted a good contract within the statute of frauds. This was expressly held in *McKnight v. Dunlop*, 5 *N. Y.* 542, on a similar contract.

But I have a further remark in regard to the severe criticisms upon the finding of the referee. It is urged that he found the negotiation in March or April to be a valid sale. This is not just to the referee. He has not said so in terms, and it cannot be fairly implied from what he did say; nor would it be material as to the result of this action whether this agreement, if it was finally valid, was made so at the first negotiation or at the time of the delivery, on the 6th of May. *McKnight v. Dunlop*, 5 *N. Y.* 542. The referee first made a general report, and then a separate finding of the facts. In his general report he says: "I find that the plaintiff sold, at the city of Albany, to the defendant, in the latter part of March or first of April, 1856, fifty tons of bones, &c., . . . amounting to nine hundred and sixty-one dollars and sixty-one cents; that, on the 6th day of May, 1856, said goods were delivered to the defendant at plaintiff's dock in the said city of Albany; . . . that the plaintiff paid, on account of the said goods, so sold and delivered, nine hundred dollars;" and, as conclusive that the referee did not even intend to hold, as is alleged, that the negotiation in March or April was a valid contract, he expressly says in his finding, "that upon the delivery of the goods on board Casey's barge, in pursuance of aid directions, a valid contract of sale was consummated upon the terms and at the prices previously agreed upon." This is a perfect negation of the argument and charge, that the referee

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held the negotiation to constitute a valid agreement. All that is required in law to make a valid sale, is a proposition in writing by the party to be charged; an acceptance of the proposition according to its terms, by the party to whom it is made, within the time required, and a delivery of the property sold, in accordance with the terms of the contract. The minds of the parties have met in all the particulars of the proposition and acceptance of the written agreement, and the delivery has consummated it. It cannot legally be evaded. We can neither reverse these facts or trifle with the necessary legal conclusions to be drawn from them.

Another point is urged that the delivery of the bones was not made to the defendant or to his authorized agent. If delivery is a question of fact, we have no more right, on this than upon the former question, to enter into a controversy with the referee; that was the business of the court below. So far as delivery to some person is in question, it is a fact which we must assume, and cannot struggle with. Whether the delivery on board of Casey's boat, instead of Warner's, was a good delivery to Warner, or whether Warner was the authorized agent of the defendant to receive the goods, are partly questions of fact and partly of law. So far as they are questions of law we may examine them. But we cannot even examine the law, except by first examining the facts upon which the referee based his conclusion of a delivery to Warner, and his conclusion upon those facts must be our conclusion. In the negotiation in March or April, defendant said, "he had spoken to Warner, and hired him to freight these bones down the river." In his letter of the 16th of April, to the plaintiff, he says, "I wrote to Warner to bring the bones; you will please deliver them to him." Surely this is a sufficient appointment of Warner as agent, to receive the delivery, and the plaintiff had no need of looking further than to Warner for this purpose. For the purpose of receiving the bones, Warner was the defendant; Warner's direction was the defendant's direction.

The plaintiff testified: "I delivered the bones on the dock at my place to Mr. Warner; I delivered them, as I understood it, according to my agreement with Mr. Menck; I delivered

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the bones to Captain Casey according to the direction of Warner; Mr. Warner directed me to deliver these bones to Captain Casey, as I understood it." It is true that Warner denies that he had any authority to receive the delivery, but this the defendant's own letter contradicts, and he denies the delivery to him. Here was a conflict. The referee believed the plaintiff, and we have no right to say, here, though we might differ with the referee, that Warner rather than the plaintiff should have been believed. Assuming that the plaintiff testified to the truth—as the referee assumed, and as we must—a delivery in fact and in law is then fully established. If this be true, what occurred after the delivery, as to the manner of obtaining the money, is immaterial; of which, a word hereafter. The liability accrued at the delivery. The cause of action was then perfect.

It is also urged that the referee erred in the admission of evidence to prove the agency, to wit, directions and conversations with Warner on the subject of the delivery of the bones. The soundness of this objection, like those we have examined, depends upon our right to entertain a controversy with the referee, in his findings, within his province. Before he admitted this evidence, it had been established beyond question that Warner had been authorized by the defendant to receive the delivery of the bones. The defendant says: "You will therefore please deliver them to him." We shall not be expected to cite authority in this court to prove that the acts and declarations of an agent, done and made for the purpose, and within the scope of the particular employment for which he was appointed, can be given in evidence against his principal. Nor shall I occupy time in demonstrating that a satisfactory delivery to Warner, the agent, was a good and satisfactory delivery to the principal; that if Warner directed and was satisfied with a delivery on board of Casey's barge, instead of his own, that was a good and satisfactory delivery to the defendant. If this be so, let us not depart from precedent and authority, for any conceptions of hardship or injustice in a particular case. I do not regard this objection as well taken, or as having any force.

Another objection taken by the court below (for I am

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meeting their objections as they seem to be repeated in the brief on the part of the defendant's counsel), is, that the referee erred in sustaining the objection to the question put to the plaintiff as a witness, to wit: "Did you deliver these bones to Captain Casey?" The only objection raised was, that the question called for a legal opinion. The ruling was right in that view. If the defendant desired only the fact, which he was entitled to, he not only obtained that by his next question but assented to the correctness of the ruling, and waived his exception, as will be seen. "Did you not as a matter of fact, and not as a legal opinion, deliver these bones to Captain Casey?" This was the same question as the former, stripped of the objection, and no objection was then made to it, so the defendant was not injured by the ruling on the former. He obtained a full answer to this question; he took no objection to the answer; he did not complain that it was not full and satisfactory; he did not ask to have any portion of it stricken out. He answered: "I delivered the bones to Captain Casey, by the directions of Mr. Warner." Here was the fact without the law. What then is there in this to complain of? How is the defendant injured by this ruling? Not at all, most clearly.

Another subject of objection, in the opinion of the supreme court, is, that the defendant's telegram was sent as a reply to a deceptive one to him, and it was therefore obtained by fraud. If this was true, it furnished a good reason for that court to have reversed the referee's findings, which they did not do, and which we can not do. And, if we could review the evidence, we should see that the plaintiff had nothing to do with, and for aught that appears in evidence, was ignorant of, any deception in that respect. I have thus far treated the points I have discussed irrespective of the evidence of the telegram of the defendant referred to. It was sufficient to prove the defendant's own voluntary letter directing the delivery to Warner. Without the telegram, there is evidence enough to sustain the finding.

The most unreasonable objection, and one which has the least application of any to the merits of the question here, is the severe stricture upon the conduct of the plaintiff in his

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manner of obtaining the payment of the money from the defendant. If we were here settling a mere question of ethics I should concur in this argument upon this point. The plaintiff's conduct and declarations, in misrepresenting and in concealing the knowledge of the sinking of the barge, is in no wise to be commended, and can not be justified in morals; but all that has no bearing upon the questions to be decided in this case. It had or might have had a strong influence upon the credit of the plaintiff as a witness. No moral misconduct of the plaintiff, however, after his rights had become fixed and perfect, could be carried back so as to change those rights. By the delivery of the goods to the defendant, the agreement was consummate, and the consideration had become a debt due. No bad faith after that could effect a change in that respect.

It was held in this court that moneys obtained upon false representations ought not to be recovered back, if the party who had so obtained them had an equitable right to such moneys. *State of Michigan v. Phoenix Bank*, 33 *N. Y.* 9.

In every view I have been able to take of this case, I think the order of the general term ought to be reversed, and the judgment on the report of the referee affirmed, with costs.

All concurred, except WRIGHT and DAVIS, JJ., who dissented, and PORTER, J., who did not vote.

Order granting new trial reversed, and judgment on report of referee affirmed, with costs.

THORN v. HELMER.*

December, 1865.

In an action for deceit whereby the plaintiff was induced to abandon his professional practice in one place and remove to another place, and enter into partnership with the defendant, it is competent for the plaintiff to testify as to the value and growing character of the abandoned practice, not to affect the damages, but to show his reliance upon the defendant's representations.†

* Compare *Smith v. Countryman*, 30 *N. Y.* 655.

† See, as to the admissibility of opinions on questions of damages,

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Whether he believed the defendant's representations is a question of fact, upon which he may testify.

Evidence as to the amount of professional business done by both plaintiff and defendant during the year they practiced together as partners, is admissible to show presumptively that the defendant greatly misrepresented his practice during the preceding year.

It is competent to show the worth of a house and lot for which the plaintiff paid far more than it was worth, as tending to show the plaintiff's belief in the defendant's representations as to the amount of his practice.

It is also admissible as affecting the question of damages.

The testimony of a physician, practicing in the place, as to his knowledge of the number of cases of fracture existing at one time in such place, is competent to show the falsity of the defendant's representations as to the number of such cases that he had had at one time.

An agreement with the defendant at the end of the first year of the partnership, to dissolve the partnership and allow the defendant to continue in practice in the place, in no way released the defendant from any liability he was under for his false representations.

Samuel S. Thorn sued Jacob H. Helmer, in the supreme court, for deceit, and alleged in his complaint that defendant, on and prior to September 8, 1857, falsely represented to him that his professional business then was, and had been, worth five thousand dollars per year, and could be easily increased so as to be worth seven thousand dollars per year; that his cases of surgery alone were sufficient to support his family; that for a long time he had on hand, on an average, eight cases of fracture; that his extensive practice obliged him to keep four horses; and to employ Dr. Hill, his former partner, to practice for him at an annual salary. That thereby defendant induced plaintiff to abandon his practice in physic in Milwaukee, Wis., and to remove to Lockport, N. Y., and to enter into a contract, in writing, with defendant, to purchase his house for seven thousand dollars (alleged to be some one thousand five hundred dollars above its actual value), and to enter into partner-

Taylor v. Bradley, p. 363 of this volume, and 3 *Abb. N. Y. Dig.* 2 ed. 79, where the cases are collected from which the general rule may be deduced, that where a witness is competent, and states the facts, his conclusion or opinion as to the pecuniary injury to property having a market value, is admissible.

* See *King v. Fitch*, vol. 2 of this series, p. 508, and note.

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ship with him for the term of two years; defendant to be at liberty to withdraw from the firm at the end of one year, provided he withdrew from the practice at that place. That for the year plaintiff practiced with defendant, their charges for professional services were about two thousand two hundred and fifty dollars, worth from one thousand dollars to one thousand two hundred dollars; and their surgical business only worth about two hundred and fifty dollars.

Upon substantially this state of facts, the jury found that plaintiff had sustained damage in the sum of one thousand dollars.

The supreme court, at general term, denied a new trial, and judgment was rendered for plaintiff. Defendant appealed.

S. E. Church, for defendant, appellant.

Lyman Tremain, for plaintiff, respondent.

WRIGHT, J. [After stating the facts.]—Any questions open for review in this court arise upon exceptions to the admission of evidence, and to the refusal of a motion for a non-*recit*. These will be noticed in the order in which they arose on the trial.

1. The plaintiff himself, as a witness, was inquired of and allowed to testify as to the value of his professional business at Milwaukie, at the time of his entering into copartnership with the defendant, and as to its being a growing business. I do not regard this as error. It may be conceded that the evidence was inadmissible on the question of damages; and so the judge, unsolicited, instructed the jury. But, I think, it was competent in another point of view. To make out the plaintiff's case, it was necessary to prove that he relied upon the defendant's representations; and this could be done by direct evidence, or by circumstances tending to show such reliance. In this latter class the proof falls. The defendant made certain representations as to the amount and value of his practice at Lockport. The plaintiff was engaged in a practice at Milwaukie, profitable and increasing. Would not such a

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fact have a direct and strong tendency to induce the belief that such practice and future prospects would not be given up without the plaintiff was convinced that his prospects at Lockport was very advantageous? Would he be likely to abandon his practice at Milwaukie, if it were a valuable and increasing one, for the purpose of going to Lockport, unless he believed in the representations made by the defendant, and that his position at Lockport, assuming the representations to be true, would be beneficial to him? It was proof tending to make out that a strong motive must have been present to induce such removal. A reliance on the defendant's representations would furnish such a motive. Any evidence, therefore, tending to show that a strong motive must naturally have existed to induce this removal, was proper.

2. The plaintiff, as a witness, after giving evidence showing that the defendant, prior to the execution of the contract, made to him the representations set forth in the complaint, was asked the question: "Did you believe the representations so made to you by the defendant?" The witness answered, under objection, that he did believe them. The ruling here was not erroneous. The case of *Seymour v. Wilson*, 14 N. Y. 567, is decisive upon the point. There it was held that it was competent to inquire of an assignor, whether, in making the assignment, he intended to delay or defraud his creditors. But I quite concur with the supreme court that, on principle, the testimony was admissible. The plaintiff was a competent witness to testify to any relevant fact in the case within his knowledge. The question whether he believed the representations of the defendant was one of fact, and his answer as to the fact, directly, was no more objectionable than proof by him of circumstances tending to show it. The impracticability of contradicting a witness when he is allowed to testify to the operation of his own mind, forms no objection to the admissibility of such testimony. It is to be received, and the weight to be given to it is a question for the jury.

3. Evidence was admitted as to the amount of professional business done by the plaintiff and defendant pursuant to the contract, during the year they were together, and also as to the number of horses required to be kept by them for the

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transaction of such business. It was offered and admitted as having a tendency to show the amount of business done by the defendant the year immediately preceding, and at the time of making the contract. The defendant represented that his business was worth five thousand dollars per year, that it then was, and had been worth that sum, and that he was obliged to keep four horses to do it. If that were true, the presumption naturally would be that it would continue, at least, about that sum in the succeeding year. There was no such change of circumstances shown as to render it probable that a great diminution of business would ensue. I think the evidence was competent and proper for the purpose for which it was offered and received. It showed the existence of a circumstance from which it might naturally and justly be inferred that the practice of the defendant the year preceding had not been as great as represented by him, nor anything like it.

4. A witness on behalf of the plaintiff was asked this question: "What, in your opinion, were these premises (the house and office sold to plaintiff by defendant) worth on September 8, 1857?" This was objected to, on the ground of the immateriality of the evidence called for by the question; but the objection was overruled, and evidence given of the actual value of the premises at the time of entering into the contract. This was not error. The complaint averred that, at the time of entering into the contract, the house was not worth more than five thousand five hundred dollars; that for the purpose of inducing the plaintiff to purchase the house and office at a large price, and more than their value, and to enter into partnership with the defendant, the latter made the representations as to the extent and value of his practice, and that the plaintiff, trusting in the representations, and being deceived thereby, "did enter into an agreement with said Helmer, in writing, wherein plaintiff agreed to purchase said house and lot of said Helmer, for seven thousand dollars," and to enter into partnership with him. It was competent for the purpose of sustaining these allegations, to show exactly what the house was worth, and that the plaintiff was induced to buy it at a much larger sum, by the representations of the defendant as to the amount of his practice; for the purchase of the house and

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the entry into partnership were to be concurrent acts—substantially one transaction. They were, in fact, the subject of a single contract. In the court below, the competency of the evidence was placed upon grounds similar to those justifying the admission of proof of the plaintiff's business and prospects at Milwaukie, viz: its tendency to show that the plaintiff believed in the representations of the defendant as to the extent and value of his professional business. It may stand on that ground, for it may be pertinently asked, would the plaintiff have given the enhanced price, unless he had believed the representations? The giving of such price manifestly tends to show that he did believe them. But we are of the opinion that the evidence was competent and proper on the question of damages. The plaintiff was induced, by the fraudulent representations of the defendant as to the extent and value of his professional business, to purchase his house and office for confessedly more than their value, and form a business connection with him, to continue at the furthest but two years, and at the option of defendant it might terminate in one year. The two things formed the subject of one contract, and the plaintiff was induced to enter into it by the fraud of the defendant. It was parcel of the contract that he was to pay a sum for the defendant's premises and place of business, much greater than their real value, not, as was said by the court below, as a part of the price paid for the business connection, for there would have been no such connection had it not been for the fraud practiced by the defendant; but, as will be appreciated by every medical practitioner, for the benefit and advantage expected to result from occupying the office and place of business of his predecessor in the profession. And this disposition of his place of business for a sum over its real value, was the precise advantage sought and gained by the defendant by his fraudulent representations as to the amount of business he was and had been doing. We are, therefore, of the opinion that, on the question of damages, it was competent for the jury to consider the price paid for the defendant's premises over their real value. The rule is, that the party injured by fraud in the making of a contract is entitled, by a recovery, to be placed in a situation equally beneficial, as to the subject of the contract,

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as he was induced by the fraud of the defendant to believe he would be, and in reference to which he entered into the contract.

5. Dr. McCullum, who had been a practicing physician and surgeon in the village of Lockport for fourteen years, after testifying that he was acquainted with the defendant and his "ride" about as much as one physician generally is with that of another in the same village, that the population of Lockport was between 8,000 and 9,000, and that there were twelve or fourteen physicians in the village and its vicinity, was asked the question: "How many cases of fracture have you known to exist in the village of Lockport and its vicinity at any one time?" The defendant's ground of objection to the question, and the evidence called for thereby, was its irrelevancy and immateriality; which objection was overruled, and the witness answered that the greatest number of fractures he had known to exist at any one time in Lockport was three or four. I do not think this error. The defendant had represented that he had had on hand, on an average, eight cases of fracture for a long time. The truth of this representation might be disproved by circumstantial as well as by direct evidence. Proof that the whole number of cases of fracture existing in Lockport and its vicinity at any one time was not eight, would show the falsity of the representation. I think it was competent to inquire of Dr. McCullum, who had practiced medicine and surgery at Lockport for fourteen years, how many such cases altogether he had known to exist at one time. He possessed a general knowledge of the subject, and the testimony was competent, as far as it went, as tending to show the number of fractures there were altogether. It was no objection to its competency that the other physicians of the village were not offered to be called to the same fact. By showing that all the cases of fracture did not amount to eight, the representations of the defendant would seem to be false.

6. The motion for a nonsuit was properly overruled. All that was required of the plaintiff to entitle him to recover was to show the fraud of the defendant, that he was deceived and imposed upon by such fraud, and that he had sustained damage thereby. These were questions for the jury. It is not claimed, however, that upon the merits the case should have been with-

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held from the jury. The ground taken on the trial, and now, is that the plaintiff, after a knowledge of all the facts respecting the defendant's professional business, ratified the contract between them, and waived any pretended fraud which induced him to enter into it. It appeared that the parties were one year in business together, at the end of which time the connection was dissolved, and an agreement, in writing, was attached to the original contract, allowing the defendant to practice his profession in Lockport, if he chose. The operation of this voluntary modification of the contract of September 8, 1857, was not to preclude the plaintiff from suing for the fraud practiced upon him, by which he was induced to enter into such contract. The original agreement was that the partnership was to continue two years, with liberty to defendant to withdraw at the end of one year, provided he withdrew entirely from practice at Lockport, and the subsequent agreement merely took off the restriction from the defendant as to his practicing at Lockport. This the plaintiff had a right to do without in any manner compromising his action for the fraud. This second agreement in no way released the defendant from any liability that he was under in regard to his false representations. The fact that when the partnership was dissolved, the plaintiff made no claim to have been defrauded in the contract of September, 1857, but went on in its fulfillment on his part, has no significance. It was not shown that he had then discovered the fraud; but if it had been, and he was silent on the subject, it could not have altered his legal rights. A party who has been drawn into executing a contract by fraudulent representations, may affirm the contract after the discovery of the fraud, and, notwithstanding such affirmance, sue for the fraud. The plaintiff had the right to go on, fulfill his contract, and recover damages for the fraud practiced upon him. By doing so, he waived no legal right.

Upon the whole, I am of the opinion that none of the exceptions are well taken, and that the judgment should be affirmed.

All the judges concurred, except BROWN, J., who dissented, and CAMPBELL, J., absent.

Judgment affirmed, with costs.

 Thorp v. Ross.

THORP v. ROSS.

December, 1868.

Where, during the performance of a contract, the contractor is prevented from proceeding by an obstacle which can not be removed without the payment of money,—*e. g.*, by the necessity of a license from the public authorities to allow part of the work to be done,—the contractor can not, without request from the employer, pay the expense and recover it from the employer in an action for money paid.

Parol evidence is not admissible to show that in the negotiations which led to the execution of a written building contract, it was verbally agreed that a disbursement necessary for part of the work should be made by the contractor.*

*.In *THOMAS v. HUNT*, (Sept., 1867,) the same principle was applied. Samuel Thomas sued Horace Hunt and Andrew Kingsley, for stone sold and delivered to defendants, by plaintiff and his partner, Reynolds, for building canal culverts. The stone was furnished under a written contract between the parties, the only material clause of which was that plaintiff and his partner were to deliver all the stone necessary and proper for building the culverts: "said stone to be of the sizes and qualities such as the engineer in charge of the work on said section shall approve." On the trial the defendants offered to show that, at the time of making this contract, a large quantity of good stone were lying in the yard of the plaintiff, and near the quarry, and that such stone were shown to defendants as samples of their stone, and that the stone furnished to be cut were of an inferior quality to those, and cost much more to dress them, and were not as suitable for the work. Plaintiff objected to the introduction of this evidence, and the same was excluded and the defendants excepted.

The supreme court affirmed a judgment for the amount claimed, and defendant appealed.

S. G. Hadley, for plaintiff, respondent;—Cited, *Woodruff v. McGrath*, 32 *N. Y.* 255; *Kerr v. McGuire*, 28 *Id.* 466; *S. C.*, 28 *How. Pr.* 27; *Davis v. Spencer*, 24 *N. Y.* 390; *Hoyt v. Thompson*, 19 *Id.* 207; *Weed v. N. Y. & H. R. R. Co.*, 29 *Id.* 618; *Grant v. Morse*, 22 *Id.* 323; *Code*, § 272, Reformed Dutch Church v. Brown, 24 *How. Pr.* 76, and cases cited; affirming 29 *Barb.* 325, and 1st *How. Pr.* 287; *Borst v. Spelman*, 4 *N. Y.* [4 *Comst.*] 284-289; *Dunham v. Watkins*, 12 *N. Y.* [2 *Kern.*] 560; *Griffin v. Marquardt*, 17 *N. Y.* 28; *Miller v. Schuyler*, 20 *Id.* 522; *Carman v. Pultz*, 21 *Id.* 547; *Phelps v. McDonald*, 26 *Id.* 82; *Bergin v. Wemple*, 30 *Id.* 319; *Stewart v. Smith*, 14 *Abb. Pr.* 75.

Thorp v. Ross.

Japhet M. Thorp and others, sued Angus Ross, in the supreme court, for money paid. Plaintiffs were masons, and made a written contract to erect houses on defendant's land, for a specified sum in gross. The specifications required the construction of a drain from each house, to connect with the sewer. A city ordinance imposed a license fee of ten dollars for each drain thus constructed. The plumber employed by plaintiffs paid the fifty dollars to the city, on tapping the sewer, and plaintiffs reimbursed him, and now sought to recover the amount from defendant.

At the trial, after proof of these facts, defendant was allowed, under exception, to prove a conversation had between one of the plaintiffs and himself, before executing the written building contract, and while the negotiations between the parties were closing. The conversation was to this effect :

Amasa J. Parker, for plaintiff, respondent ;—Cited, *Rodgers v. Fletcher*, 13 *Abb. Pr.* 299 ; 1 *Greenl. Ev.* § 50 ; 277, and cases there cited ; *Lewis v. Blake*, 10 *Bosw.* 198 ; *Corning v. Corning*, 6 *N. Y. [2 Seld.]* 97 ; *Cooper v. Barber*, 24 *Wend.* 105 ; *Van Buren v. Wells*, 19 *Id.* 203 ; *Adsit v. Wilson*, 7 *How. Pr.* 64 ; *Roth v. Schloss*, 6 *Barb.* 308 ; *Phinckle v. Vaughan*, 12 *Id.* 215.

BY THE COURT.—DAVIES, Ch. J.—The ruling of the referee was clearly correct. The evidence was properly excluded, for several reasons.

1. The written contract between the parties must be regarded as containing the whole of their agreement upon the subject-matter thereof and as merging therein all prior and contemporaneous conversations, stipulations, and negotiations in relation thereto (*Renard v. Sampson*, 13 *N. Y.* 561).

2. The testimony offered tended to contradict, alter and vary the written contract between the parties. In the agreement it was stipulated that the size and quality of the stone were to be such as the engineer in charge of the work should approve. The offer was, to show, that the stone to be delivered was to be like a sample exhibited at the time of the execution of the contract, and that the stone delivered was of an inferior quality to the sample. It was not competent for the defendants, thus by parol, to alter, vary, or contradict the written contract.

[Remarks to the effect that the answer did not allege this defense, and that the remaining exceptions were unavailable, are omitted.]

All the judges concurred.

Judgment affirmed, with costs.

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"*Plaintiff* :—Mr. Ross, you ought to pay for tapping the sewers.

"*Defendant* :—No, I will not pay for anything.

"*Architect* :—What do you say, Mr. Thorp; I want this understood ?

"*Plaintiff* :—Well, I suppose I will have to stand it.

"*Architect* :—Well, I will draw up the contract."

The contract drawn and signed made no reference to these fees.

The supreme court, on a referee's report in favor of the defendant, held that the parol agreement although made contemporaneously with the written agreement, was binding as a separate undertaking. The plaintiffs appealed.

A. C. Morris, for plaintiffs, appellants ;—Insisted that the law implied a promise to repay this customary and indispensable disbursement; that the parol evidence was inadmissible as varying the contract; citing *Rich v. Jackson*, 4 *Brown's Ch.* 575, and that if regarded as a separate agreement it was without consideration.

A. B. Millard, for defendant, respondent ;—Insisted that there was no request proved; and had the parol evidence been rejected, plaintiffs could not recover.

BY THE COURT.—WOODRUFF, J.—The judgment herein cannot, I think, be sustained upon the grounds upon which the decision was placed by the referee, or by the supreme court, to wit, that the parol agreement of the plaintiffs to pay the license fee for tapping the sewer, made contemporaneously with the execution of the written agreement, was binding upon them though not included in the writing, because it was a separate or collateral undertaking.

The defendant agreed, in writing, to pay to the plaintiffs four thousand seven hundred dollars, and no more.

The plaintiffs, on the other hand, agreed, by the writing, that for that four thousand seven hundred dollars they would do and perform certain work, labor, &c., mentioned therein.

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Now to permit the defendant to show, that it was, at the time of the making of the agreement, verbally stipulated that for that same four thousand seven hundred dollars the plaintiffs should do or pay anything which the writing did not expressly nor impliedly embrace and bind them to do or pay, is to allow the written contract to be altered by parol. Just as much so as it would be altered by permitting the plaintiffs to prove, that, besides the payment of the four thousand seven hundred dollars, the defendant was to do or pay something else as a further compensation for what the plaintiffs, by the writing, agreed on their part to do.

Whatever the plaintiffs were bound to do, was to be paid for by the four thousand seven hundred dollars. Whatever the defendant was bound to pay was to be recompensed by just what the plaintiffs agreed to do. And to each of them the writing is the sole and exclusive evidence. It was not, therefore, competent to show by parol, that for this same four thousand seven hundred dollars the plaintiffs were also to do something which the written agreement did not bind them to do.

It is insisted that the fair interpretation of the writing bound the plaintiffs to perform the work of tapping the sewer, and therefore, by implication, bound them to pay the license fee, without the prepayment of which they could not perform the work.

I express no opinion upon the construction of the contract in that respect, nor on the supposed implication.

My conclusion is, that the judgment should be affirmed upon this very brief statement of the right and duty of the parties, viz. :

The plaintiffs were bound by the true meaning and effect of the written agreement, to procure the license to tap the sewer, and pay therefor, or they were not so bound. .

If they were bound by the writing to procure the license and pay therefor, then, of course, they can not recover it from the defendant.

If they were not so bound, then they have paid the money without the defendant's request, and without any authority to pay money on his account; it was a voluntary payment, and imposed on him no legal obligation to refund.

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It is asked, were the plaintiffs (if not themselves bound to pay the license fee), bound to suffer the performance of the work to be defeated by the defendant's non-payment of the license fee, and so lose the profits of their contract?

By no means. Doing on their own part all that they were bound by their contract to do, or all that they could lawfully do, if the defendant failed to remove any obstacle to the complete performance which it was his duty to remove, his neglect or refusal would be to them a perfect excuse, and they could recover all the value of their contract.

If a builder contracts with another to build for him a house upon a specified lot of land, but finds, when he begins to build, that another is in possession, and is, in fact, the owner, the builder can not purchase the lot for the contracting party and recover from him the price paid, on the idea that without such purchase he could not perform his contract and realize the profits thereof.

Or if he finds the lot in the possession of a tenant under an unexpired lease, he can not purchase the unexpired term and charge the purchase money to the contracting owner of the fee.

And so, generally, where one has contracted to perform work, &c., of the description in question, if he find obstacles in the way which can not be removed without the payment of money, and it is the duty of the party contracted with to remove such obstacles, and so enable him to perform his contract, he may require such party to remove them, and if such party refuse he will be excused *pro tanto* from the performance of his contract, and may recover his full profits, but he can not volunteer to pay the money himself, and then compel the other to repay that which he had refused to pay. It would be strange if a request that the plaintiff pay money could be implied from the refusal of the defendant to pay it.

Upon this ground the judgment must be affirmed.

All the judges were understood to concur in holding the parol evidence inadmissible; a majority concurred in the foregoing opinion for affirmance on the other ground.

Judgment affirmed, with costs.

Tompkins v. Soulice.

TOMPKINS v. SOULICE.

September, 1852.

An order of the supreme court affirming a surrogate's order refusing leave to discontinue an accounting, and directing the hearing to continue—since it is not a final order, is not appealable to this court.*

Tompkins having been superseded as guardian by the appointment of Soulice, cited Soulice to attend a final settlement of his, Tompkins', account; but after filing the account and the hearing of witnesses, he asked leave to discontinue the proceeding, in order that he might file a new account. The surrogate entered an order refusing the motion, and directing the hearing to proceed.

The supreme court, at general term, affirmed the order.

BY THE COURT.—RUGGLES, Ch. J.—In *Messerve v. Sutton*, (3 *N. Y.* [3 *Comst.*] 546), Catharine Messerve instituted proceedings before the surrogate of New York to recover a legacy, and cited the executors, who appeared and contested her right. The surrogate, after hearing, dismissed her petition. She appealed to the supreme court where the decision of the surrogate was reversed and he was directed to proceed with the account. On appeal to this court from the decision of the supreme court, a motion was made to dismiss the appeal on the ground that the judgment of the supreme court was not final. But it was held that the judgment of the supreme court was final as respected that court, and the motion was denied.

In another case determined in this court, there had been a final judgment in the common pleas of New York, which was reversed on writ of error by the supreme court, and a new trial ordered. An appeal from the judgment of the supreme court to the court of appeals was held to be well brought. But in both these cases, the original order in the court below, which was reversed in the supreme court, was a final judgment.

* Compare *Hartung v. The People*, 26 *N. Y.* 158; *Pearson v. Lovejoy*, 53 *Barb.* 407.

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In that respect those cases differed from the present. We can not review the judgment of affirmance by the supreme court in the present case, because the surrogate's order affirmed by the supreme court was not final.

The parties must proceed to a final determination in the surrogate's court, and if the appellant in the present case should feel aggrieved by that determination he can then appeal; and if the order now appealed from be one affecting the merits of the case, it may be reviewed on that appeal.

TRAVER v. EIGHTH AVE. R. R. CO.

September, 1867.

Under the Code of Procedure, the only way to take advantage of a mere misnomer,—*e. g.*, the bringing of an action by a married woman in her maiden name,—is by answer; if not set up by answer, advantage can not be taken of it on the trial.

A mere misnomer in pleading is a formal error, amendable in the court of original jurisdiction; and will not be noticed in this court.

Where a minor child is injured by negligence, the parent may recover for the loss of service for the remainder of the period of minority; and, if the disability continue beyond that period, the child may recover for such further loss.

Amelia Traver, by A. Bull, her guardian, sued defendants in the New York superior court, for damages, by an injury alleged to have been caused by the carelessness of the defendants' servants, while plaintiff was a passenger on one of their cars. After the injury, and before suing, plaintiff intermarried with one Collins, but in the summons and complaint in the action she was designated by her maiden name. She was about 13 years old at the time of the injury, and but a few months past 21, at the time of the trial.

Upon the trial, evidence was received under exception, as to how much she could earn per week, prior to the injury, and that some money had been expended in taking care of her the last year preceding the trial.

Defendant moved to dismiss the complaint, on the ground, among others, that the action was improperly brought in plain-

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tiff's maiden name, instead of the name acquired by marriage. The motion was denied.

It appeared that an action had been previously brought by plaintiff's mother, and a recovery had for loss of plaintiff's services, and the expense of taking care of her.

The court charged the jury that nothing could be recovered for those causes in the present action. The jury gave plaintiff a verdict for twenty-five hundred dollars.

The superior court at special term, denied a motion for a new trial. Judgment on the verdict was affirmed at general term. Defendants appealed.

J. W. Ashmead, for the defendants, appellants;—Cited, *Cowden v. Wright*, 24 *Wend.* 429; *Clark v. Vorce*, 19 *Id.* 232; *Myers v. Malcolm*, 6 *Hill*, 292; *Dresser v. Ainsworth*, 9 *Barb.* 625; *Worrall v. Parmalee*, 1 *N. Y.* (1 *Comst.*) 519; *Erben v. Lorillard*, 19 *N. Y.* 303; *Welles v. Hudson River R. R. Co.*, 14 *Id.* 433; *Button v. Hudson River R. R. Co.*, 18 *Id.* 248.

John H. Reynolds, for plaintiff, respondent.

BY THE COURT.—GROVER, J.—Commencing the action in the maiden name of the plaintiff, instead of that acquired by marriage, was a misnomer merely. There was no pretense but that the plaintiff was the proper person to sue, and the only one that could maintain an action for the injury sought to be redressed. Under the practice prior to the Code, misnomer of either party could only be plead in abatement of the action (2 *Grah. Pr.*, and cases cited). Neglecting to interpose such plea waived any advantage to the defendant therefrom. The mistake was amendable by the court. The misnomer was not ground of nonsuit upon the trial. It was not like the case of bringing an action by the wrong party; that was ground of nonsuit. By the Code, pleas in abatement are abolished (*Code*, §§ 142-151). The only mode of presenting such a defense is, under the Code, by answer. No such defense is set up in the answer in the present case. It was, therefore, unavailable upon the trial. In *Bank of Havana v. Magee* (20 *N. Y.* 355), it was held that although there was no such corporation, and that it was only a name assumed by Charles Cook

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for the transaction of his banking business, yet bringing the action by Cook in such name was but a mere formal error, amendable in the courts of original jurisdiction, and to be disregarded in this court.

That case goes much further than it is necessary to go in the present. In that case, upon the papers, it would appear that the action was brought by a corporation, and not by Charles Cook, while in the present the plaintiff was the same, whether called by the married or maiden name.

The evidence of what the plaintiff could earn before the injury was held by the judge not to be material, and the jury were instructed not to give any damages for loss of services, inasmuch as the plaintiff's mother had previously recovered therefor. This direction would not have cured the error (if one was committed), in receiving the evidence, if that was such as was calculated to create a prejudice in the minds of the jury, and influence them in fixing the amount of damages, unless it appeared, from the whole case, that the jury were not so influenced (*Erben v. Lorillard*, 19 *N. Y.* 209). The evidence in the present case was not likely to influence the jury upon the question of damages, unless they were convinced that the injury of the plaintiff was of a character to prevent her from attending to her business after she was twenty-one; and, if so convinced, the evidence was proper for the consideration of the jury. When a child, under twenty-one, is injured, the parent can recover for loss of service until the arrival of the child to that age; and, if the disability continues beyond that time, the child may recover for the loss. Upon this point, the case was tried as favorably to the defendant as the law required. No claim for loss of service was made by the plaintiff after she was twenty-one; and the jury were told that the mother had recovered for such loss up to that time. No ground of objection to the proof of what the expense of taking care of the plaintiff had been, was stated. The exception to the proof does not, therefore, raise any question for the consideration of this court. The judgment appealed from must be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

Truslow v. Putnam.

TRUSLOW v. PUTNAM.

December, 1864.

Personal property, in the possession of a bailee having a lien thereon, can not be taken from his possession on attachment against the bailor.*

William Truslow sued Mervin G. Putnam in the Supreme Court in an action in the nature of replevin, for seven sewing machines, manufactured by one Lester, of whom the plaintiff was agent and factor, and on which plaintiff had a lien for advances and commissions, to an amount beyond the value of the property. Defendant, as constable, levied on the same under an attachment against Lester, and was about removing them when plaintiff replevied them in this action.

Plaintiff held the machines under a written agreement with Lester, the owner, by which plaintiff agreed to act as agent for Lester for the sale of sewing machines made by Lester, and

*This decision as to the right of the bailee, though conflicting with *Stief v. Hart*, 1 *N. Y. (1 Comst.)* 20, and *Bakewell v. Elsworth*, 6 *Hill*, 484, is supported by general principles, and may be regarded as settling the question. The very essence of a lien is the right to hold possession adversely to the general owner of the thing, and the right of an execution creditor is no greater than that of his debtor. This rule, too, harmonizes with the doctrines applied in cases of chattel mortgages. The rule applicable in respect to the interest of copartners, is now settled to the contrary in this state, *Smith v. Orser*, 42 *N. Y.* 432, affirming 43 *Barb.* 187; but it depends on different principles. A partner has no right to retain possession adversely to his copartner, as a lienor has, hence he can not resist the authority of the law to take possession, for the purpose of selling the copartner's interest. See, however, on this point, *Marshall v. McGregor*, 59 *Barb.* 519, *Menagh v. Whitwell*, 53 *N. Y.* 146. The right of a factor having a lien to defeat to that extent an attachment against his principal's property subject to the lien, was recognized in *Patterson v. Perry*, 10 *Abb. Pr.* 82; *S. C.*, 5 *Bosw.* 518. But see *Saul v. Kruger*, 9 *How. Pr.* 569. Consult also *Buskirk v. Cleveland*, 41 *Barb.* 610; *Hale v. Omaha National Bank*, 49 *N. Y.* 626, reversing, 83 *N. Y. Sup. Ct. (1 Jones & S.)* 40; *McCaffrey v. Wooden*, 62 *Barb.* 316.

For a recent statute giving a remedy to foreclose liens by action, see 2 *L. 1869*, p. 1785, ch. 739.

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to advance to Lester nearly fifty per cent. of the retail price of each as fast as made by Lester and delivered to plaintiff. The rent of the New York store, used as a salesroom, and all other business expenses, were to be paid by plaintiff and charged to Lester, and, on an accounting as to sales, Lester was to receive his living expenses, and the balance was to be paid to his certain creditors until their demands were satisfied, and thereafter to Lester. Plaintiff was to receive six per cent. on the gross amount of sales as his compensation.

Under this agreement, plaintiff hired a store in Saratoga, and employed a clerk as salesman there, and the sign bore the name of Lester only.

On the trial it appeared that the clerk, West, in charge of the store in Saratoga, informed the defendant at the time of the levy that the property belonged to plaintiff, not to Lester. Defendant then asked West what he said at the same time in answer to an inquiry as to whom he acted for while engaged in the shop in the business; but this evidence was excluded by the court.

The supreme court held that it must be deemed settled by authority that an agent, consignee, or factor, who has made advances upon the goods of his principal in his possession, may maintain an action if his possession is disturbed by process against his principal or consignor; citing *Grosvenor v. Paillips*, 2 *Hill*, 147; *Holbrook v. Wright*, 26 *Wend.* 169. See also *Gilson v. Stanton*, 9 *N. Y. (5 Seld.)* 476; *Bank of Rochester v. Jones*, 4 *N. Y. (4 Comst.)* 49; *Winter v. Coit*, 7 *N. Y. (3 Seld.)* 288; *Dows v. Cobb*, 12 *Barb.* 310; *Brownell v. Comley*, 3 *Duer*, 9; *Adams v. Bissell*, 28 *Barb.* 382. They held that plaintiff was a factor, not a mere agent. *Story on Ag.* § 34; *Evans v. Root*, 9 *N. Y. (5 Seld.)* 186; *Marfield v. Goodhue*, 3 *N. Y. (3 Comst.)* 62.

POTTER, J., however, dissented, being of opinion that plaintiff was not a factor but a mere agent, whose possession, as matter of law must be deemed to be the possession of the principal, and that to sanction his claim would be to allow debtors to screen their property from execution by putting it in possession of an agent with a lien, and that even if plaintiff was

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deemed a factor, the terms of the factors' act, 3 R. S. 5 ed. 76, § 3, excluded his claim by necessary implication, because it declared that a factor with a lien for advances should be deemed owner *so far as to give validity to any contract made by him with a third person for the sale* or disposition of the property for money advanced, &c.

In respect to the admissibility of the evidence of the notice to defendant that plaintiff had a claim to the goods, the majority of the court was of opinion that as plaintiff had put up Lester's name as a sign over the door, it was competent for him to prove this notice, as otherwise he might be deemed concluded by putting up the sign (9 Cow. 274), and that the information so given was notice, irrespective of any authority in the person who gave it.

W. A. Beach, for defendant, appellant.

L. B. Pike, attorney for plaintiff, respondent.

HOGEBROOM, J. [after referring to the facts.]—1. I am inclined to think Lester had a leviable interest in the sewing machines, liable to be sold on execution, but as plaintiff was in possession, having a valid lien thereon, and special property therein, they were not liable to be taken out of plaintiff's possession any more than the goods of a partnership from the possession of the firm, on an execution against an individual partner, hence, that the constable was liable to an action for removing the goods, and for their whole value, if the lien exceeded such value.

2. I am also inclined to think the objection to the attachment (which was overruled at the circuit) can not be considered. The defendant may have other evidence to explain, or account for the apparent defect in the attachment.

3. I think the evidence objected to was properly excluded. West was in charge of the shop, but not to answer unauthorized questions as to who was his principal. Neither Lester nor Truslow put him there for that purpose.

Nor was the evidence similar in principle to that admitted in behalf of the plaintiff. There the sheriff levied on the property

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in the shop of which West was in charge, and it was proper to show that West *notified* him at the time, that the property was *Truslow's* and not *Lester's*. It was a *notice* proper to be proven, to show that the constable had information as to the title, and to prevent any pretense of *estoppel* upon Truslow from the silence of his alleged agent when a claim was being made on the property as belonging to Lester.

The judgment should be affirmed.

All the judges concurred, except H. R. SELDEN, J.

Judgment affirmed, with costs.

TUCKER v. TUCKER.

December, 1868.

The surrogate, upon a final or litigated accounting of an executor or administrator, has no jurisdiction to try the validity and amount of a disputed demand against the estate.

The omission of the executor or administrator to offer to refer a claim, when presented, is not necessarily an admission of it, which precludes him from contesting it, and thus preventing its allowance by the surrogate, on an accounting.*

The actual submission of a contested claim to the surrogate, all the parties in interest being present, can not be sustained as an arbitration. The short limitation provided by 2 R. S. 89, § 33, in the case of a claim disputed or rejected and not referred, is only applicable where the presentment and rejection take place after publication of notice to creditors.

Nancy Tucker petitioned the surrogate for a sale of the real property of Samuel Tucker, deceased, for payment of a debt she claimed to be due her. It appeared that she had formerly presented the claim, duly verified, to Jedediah Woodward and Clarissa Tucker, the administrators, who denied the validity of the claim and refused to pay it. The administrators had not advertised for claims. Upon a final accounting of the administrators, subsequently had before the surrogate

* See Hoyt v. Bonnett, 50 N. Y. 541; reversing 58 Barb. 529; Tuck. 490.

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under the statute, at which the heirs at law as well as the next of kin and administrators were present, the claimant presented evidence in support of her claim, after hearing which the surrogate decided that it was not proved, and refused to allow it. No appeal was taken.

When the present petition for the sale of the real property for payment of this claim was presented, the heirs objected that the claim had already been tried and rejected by the surrogate, and the surrogate upon this ground refused to order the sale of the real property.

The supreme court, on appeal, held, in an opinion by GROVER, J., that this was error, and reversed the order, and the administratrix and others appealed.

BY THE COURT.—MILLER, J.—The claim of the appellants, at the time of the final account, was disputed within the meaning of the statute. When it was presented to the administrator, it was not admitted, and it appears that at one time the administratrix said she had no right to pay it, and at another, the administrator said there was fraud in the claim, and he was opposed to paying it. Upon the accounting, the demand was presented and its allowance opposed. Evidence was given in support of it, and it was disallowed by the surrogate. If it was not a disputed claim, where was the occasion for a contest? Why was it rejected, and why not allowed with other claims against the estate?

It is said, that if the administratrix doubted the claim, she should have offered to refer it, and by not doing so, it became a liquidated and an undisputed demand against the estate. The answer to this proposition is, that neither party chose to consider it in that light, and on the hearing before the surrogate, it was contested and rejected. Had it not been, there was no necessity for the introduction of evidence, and it would have been allowed as a matter of course. Nor can the claim be regarded as one about which the representatives had no knowledge whatever, and which they were not in a condition either to admit or deny, and therefore was cognizable by the surrogate under the provisions of the statute. 2 R. S. 95,

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§ 71. I think that the statute does not cover any such case, and that representatives in the discharge of their duties are not at leave to occupy the equivocal position of neither allowing nor rejecting an account presented. The statute makes provision, that if the representative doubts the correctness of the claim, he may enter into an agreement to refer it. 2 R. S. 88, § 36. But it nowhere authorizes him to hold the question of allowance or rejection in abeyance until a final accounting is had, when the claim can be contested or allowed at his volition.

The claim being clearly a disputed one, the question arises, whether the surrogate of a county has jurisdiction to hear, try and determine the amount and validity of a disputed demand, upon a final accounting of an executor or administrator.

The power of the surrogate to act and adjudicate in such a case depends upon the construction to be placed upon section 71 of 2 R. S. 96, before cited, which relates to the duties of executors and administrators in rendering an account and in making a distribution to the next of kin, and which provides that, whenever an account shall be rendered and finally settled, (except under certain sections which are stated,) if any part of the estate remains to be paid or distributed, the surrogate may make a decree for the payment and distribution thereof among the creditors, etc., according to their respective rights; "and in such decree shall *settle and determine* all questions concerning any debt, claim, legacy, bequest, or distributive share; to whom the same shall be payable; and the sum to be paid to each person." This provision of the statute has been the subject of judicial interpretation, and it has been held in several cases in the supreme court of this State, that the surrogate has no power to adjudicate in reference to a disputed claim. *Magee v. Vedder*, 6 Barb. 352; *Wilson v. Baptist Ed. Society of N. Y.* 10 Barb. 308; *Disosway v. Bank of Washington*, 24 Id. 60; *Curtis v. Stillwell*, 32 Id. 354; *Andrews v. Wallege*, 8 Abb. Pr. 425. Among the cases cited are the decisions of four general terms of this State, and in the opinions delivered, the statutes bearing upon the jurisdiction of the surrogate in such cases, and the authorities relating to the question are fully considered, so that no field of inquiry

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remains to be explored. The full examination of the question made in *Magee v. Vedder*, *supra*, forecloses further discussion at this time, and I am unable to discover any answer to the positions there assumed. In *The Bank of Poughkeepsie v. Hasbrouck*, 6 N. Y. 216, to which we have been referred by the appellant's counsel, the question now made did not arise, and the point was not involved or adjudged. The intimation made at the close of the opinion of JOHNSON, J., is not sufficiently justified to overrule the elaborate discussion of the subject in the cases cited.

Concurring mainly in the views expressed in these cases, there is little room for further remarks. It may, however, be observed that the interpretation placed upon the statute would seem to be consistent with the character and purposes of a probate court, where the jurisdiction is confined to the control and distribution of estates of deceased persons. For if the door was once open to litigate every demand which might be presented upon a final accounting, it would necessarily impose upon surrogates' courts a class and amount of business, and of labor and responsibility, far transcending the objects for which they were instituted. This clearly could never have been designed, and it is very manifestly compatible and consistent with the organization of such courts and the statute relating to them, to leave to other tribunals duly constituted for that purpose, the determination of disputed claims, which frequently involve the most intricate questions of law and fact, which must necessarily require much time in their investigation, and create extensive litigation. The jurisdiction of the surrogate is local, limited in its nature, and was never intended to embrace cases of such a character, but to be confined to the discharge of certain prescribed duties, which do not embrace the hearing and disposition of claims which are contested.

If these views are correct and these decisions cited are to be considered as decisive, then the question arises, whether the submission of the claim by the respondent and its rejection was binding and final as an arbitration, so as to preclude its enforcement afterward. It is claimed that such is the case.

As the surrogate had no original jurisdiction, and exceeded his powers, I think that the proceedings must be regarded as

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coram non judice and void, unless they can be upheld on the ground that they were an arbitration binding upon the parties, who were all represented on the occasion, consented to the proceedings, took part in the same, and submitted the matter to the surrogate. It is conceded that administrators have no power to arbitrate; and I do not think that this rule can be waived or obviated because the creditor, next of kin, and administrator were present and participated in the proceeding. For if it was binding on the creditor and next of kin as an arbitration, it was not on the administrator, and being invalid as to one of the parties, would not be obligatory upon the others. The proceeding was not in any sense an arbitration, but it was the proceeding of a court acting beyond its jurisdiction, assuming unauthorized powers and making a judicial determination void and nugatory upon its face. There is no rule of law which sanctions such an arbitration, and a judgment under such circumstances is open to assault for want of lawful authority and jurisdiction.

It is said that the provision of the statute, *L.* 1850, c. 272; 3 *R. S.* 5 ed. 181, § 72, to the effect that the final decree of a surrogate upon the final settlement of an account, &c., shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction, &c., applies to the decree of the surrogate in proceedings had on the final accounting, and is a bar to the application made by the respondent. The statute cited relates, I think, to a decree and judgment made according to law and within the jurisdiction of the surrogate, and not to a decree or judgment where that officer has plainly exceeded his authority, as was the case here. In the latter case, the decree, having been made without authority, is not a bar, and can have no effect in preventing further action.

It is also insisted by the counsel for the appellants that if the claim was disputed and the surrogate had no jurisdiction to try the question as to its validity, that then it is barred by the statute of limitations. The statute in question, 2 *R. S.* 89, § 38, enacts, that if a claim against an estate of a deceased party shall have been disputed or rejected, and shall not have been referred, the claimant, within six months thereafter, or

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within six months after the debt or any part thereof shall become due, shall "commence a suit for the recovery thereof, or be forever barred from maintaining any action thereon," &c. In *Whitmore v. Foose*, 1 *Den.* 159, it was held that the limitation of actions provided by the statute, is only applicable to cases where the presentment and rejection of the claim is after the publication of notice requiring creditors to present their claims against the estate, as authorized by section 34 of the same title. The decision in this case is, I think, a correct exposition of the statute; and I am unable to see how any distinction can be made between the case cited and the one under consideration.

It is also insisted that the respondent was barred or estopped from prosecuting his claim, by the fact that a portion of the proceeds of the personal estate had been improperly applied by the representatives, to the payment of a mortgage debt, and such payment was allowed them on the final accounting without objection from her, and without any appeal from the decree.

The fact that the estate was improperly applied does not sufficiently appear by the proceedings, and it is not shown that the mortgage paid was not executed by the intestate, and that he was not personally bound to pay the amount secured thereby. In the latter case there could be no objection to the application made; it could not be said that the whole of the personal estate had not been duly applied. 2 *R. S.* 101, § 10.

The application to sell the real estate may be made, whenever it is discovered that the personal estate is insufficient to pay the debts. *L.* 1837, c. 460, § 10; 3 *R. S.* 5 ed. 187. And in this case it is conceded, that even if the sum alleged was improperly paid, there was still insufficient to pay the whole of the respondent's demand. This last fact would entitle the respondent to pay from some source, and if the personal estate was not enough, then why should not the real estate be appropriated for that purpose? It is said that the surrogate must be satisfied that the personal estate of the deceased is insufficient, and that the whole estate which should have been applied to the payment of the debts of the deceased, has been duly applied for that purpose. 2 *R. S.* 103, § 11, sub. 3.

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The answer is, that the application was not rejected upon any such ground, and it nowhere appears that he was not satisfied. If the decree had thus stated, the point might be properly before us, but as it stands, the point does not arise.

The order of the general term must be affirmed, and the proceedings remitted to the surrogate's court of Erie county with directions to proceed thereon. The respondent also should have costs upon the appeal, to be paid out of the estate.

A majority of the judges concurred

Order affirmed, with costs to be paid out of the estate.

 TURNER v. BANK OF FOX LAKE.

June 1887.

[Affirming 23 How. Pr. 390.]

The fact that a collecting agent, upon presenting a draft, receives the drawee's check upon a local bank for the amount, and surrenders the draft to the drawee, who stamps it "paid," is not payment, so as to discharge the drawer, if the check on due presentment is refused payment.

It is not laches in the presentment of such a check, to present it through the clearing-house, the day after it is received, if this be proven to be the usage of the place.*

John W. Turner and four others sued defendants, in the supreme court, as drawers of a draft or bill of exchange, which, on presentation, was protested, for non-acceptance by the drawees.

The defense was, that the draft was given to pay a former similar draft, under false representations that the former draft had not been paid. The facts relied on, as constituting payment of the former draft were as follows: That draft was drawn by defendants, on John Thompson, a private banker in the city of New York. The plaintiffs, holding it as indorsees,

* Compare *Smith v. Miller*, 53 N. Y. 545; 43 N. Y. 171, *rev'g* 6 Robt. 413; S. C., 6 Abb. Pr. N. S. 234; *Kelty v. Second National Bank of Erie*, 53 Baro. 323; *Johnson v. Bank of North America*, 5 Robt. 554; 45 N. Y. 67.

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transmitted it to the Nassau Bank of that city, as their agents, for collection. The Nassau Bank presented it to Thompson the drawee, on August 24, 1857, and received his check for the amount of it, and surrendered the draft to Thompson, who stamped it "paid," and charged the amount to the defendants.

Although Thompson's account with the bank on which his check was drawn was overdrawn in the course of the day on the said twenty-fourth of August, all his checks presented on that day were paid. The next morning Thompson suspended payment.

On the trial it appeared by evidence that in the ordinary course, and according to custom in the city of New York, a check so received would be presented the day after it was received, by sending it through the clearing-house to the counter of the bank, on which it was drawn. This check was so presented; but Thompson having failed meanwhile, it was dishonored.

Defendants offered to prove that Thompson had funds of theirs when the draft was presented to him, and it would have been paid in specie if the collecting bank had required. This was excluded.

After judgment for plaintiffs, defendants appealed.

A. Gibbs, for defendants, appellants, cited:—*Southwick v. Sax*, 9 *Wend.* 122; *Story on Bills*, § 419; note to ed. 2, 539; *Chapman v. White*, 6 *N. Y. (2 Seld.)* 412, and cases there cited; 7 *Paige*, 457; *Caldwell v. Sanders Banker's Mag.* June, 1859; August, 1850.

B. F. Mudgett, for plaintiff, respondent, cited:—*Court of Errors*, 1800; *Porter v. Talcott*, 1 *Cow.* 359; *Van Eps v. Dillaye*, 6 *Barb.* 244; *Vail v. Foster*, 4 *N. Y. (4 Comst.)*, 312.

BY THE COURT,—GROVER, J.—The question in this case is, whether the defendants were discharged as drawers of the first draft; as their supposed liability as such was the sole consideration upon which the one in suit was drawn, and that was

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drawn in ignorance of the facts upon which it is now claimed such liability had been discharged. The question is not affected by the fact that funds had been placed in the hands of the drawee of the first draft, by the drawer, for the purpose of paying this particular draft, as the liability of the latter in such a case is the same as it is where the former is in funds for the payment of the general drafts of the drawer.

The first ground upon which the defendants claim to have been discharged is, that the Nassau Bank, the agent of the holder for the collection of the first draft, accepted the check of the drawee for its amount, drawn upon a city bank, upon presenting the draft for payment at the place of business of the drawee, in the city of New York. Although payment of such check was refused by the bank, yet so far as the drawee is concerned, it is clear that the check was no payment. He, therefore, did not pay the draft. The obligation of the defendants, was that he should pay upon presentation. The draft was presented and payment neglected by the drawee; giving the check being no payment, as to him, unless paid. That created a contingent liability against Thompson, the drawee, and may be regarded as equivalent to the taking by a creditor of an obligation against a third person from his debtor on account of a previous debt. The law is settled, in this state, that this does not amount to payment of the debt. *Porter v. Talcott*, 1 Cow. 359; *Vail v. Foster*, 4 N. Y. 212. If the obligation is taken pursuant to an agreement to take the same in payment, the rule is different.

There is no claim in the present case that there was any agreement to take the check in payment. It did not, therefore, extinguish the obligation of the defendants. That obligation was to pay the draft to the holder, if the drawee failed to pay upon presentation in due time, and the requisite notice thereof was given to the defendants. The stamping upon the draft the word "paid," by Thompson, and charging the amount to defendants was wholly immaterial. The evidence showed that it was not paid, and thus any presumption arising from the stamping was completely overthrown.

Had the holder's agent been guilty of laches in presenting the check, such laches would have discharged the defendants

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The evidence shows that it was presented the next day after drawn, through the clearing house, and payment refused, and also that this was the regular course of business for presenting checks, drawn upon banks in New York. There was no laches in thus presenting it. No question was made but that the requisite notice of non-payment was served upon defendants. My conclusion is, that defendants were properly charged upon the first draft, and that, therefore, the judgment should be affirmed.

All the judges concurred, except DAVIES, Ch. J., and BOCKES J.

Judgment affirmed, with costs.

VALTON v. NATIONAL LOAN FUND LIFE ASSURANCE SOCIETY.

March, 1864.

[Reversing 17 Abb. Pr. 268.]

The pecuniary circumstances of a person on whose life insurance is applied for, are facts material to the estimation of the risk; and in an action on the policy, the effect produced on the mind of the medical examiner by a representation that the applicant is a moneyed man, is a proper subject of inquiry.*

Gerhart Valton brought this action in the supreme court to recover on a policy of insurance on the life of one Conrad Schumacher. On the trial, the medical examiner of the defendants testified that when Schumacher applied for insurance on his life, it was represented that he was the moneyed man of a mercantile firm in which he was partner. Defendants' counsel then asked, 1. "If it had not been for the representation that Schumacher was the moneyed man of the concern, would you, from your knowledge and observation of Schumacher, have recommended the acceptance of the proposal?" 2. "Did the representation in question produce any, and if any, what effect on your mind?" 3. "Did the said representation have any influence, and if any, what, upon your subsequent action in making your certificate and report?"

*Compare Higbie v. Guardian Mutual Life Ins. Co., 53 N. Y. 603.

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The questions were excluded, as being immaterial, and defendants' excepted and appealed.

The supreme court at general term, sustained the decision in the court below, and the defendants appealed to this court.*

Lyman Tremain and *Henry Nicoll*, for defendants, appellants.

C. B. Cochran and *John K. Porter*, for plaintiff, respondent.

BY THE COURT.—MULLIN, J.—The object of a physical examination of a person proposing to insure his life in an insurance company by a competent physician, is to ascertain whether he is laboring under, or is subject to, any diseases or defect which may have a tendency to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases, as affected by habits of mind as well as of body, temperament, tendency to disease from hereditary causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe and proper to be taken—the other unsafe and improper to be taken. It is impossible to affix limits to the subjects, into which it is not only proper but necessary for an examining surgeon to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk.

Whether I am right or wrong in these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk, as affecting, in some degree, the life; and they are a legitimate subject of inquiry for the examining physician or surgeon.

This inquiry may not be material in every case, but the surgeon alone can tell whether it was or was not so in a given case. It is, therefore, competent to ask him whether he made

*For a full statement of the facts in the case and the testimony, see 17 *Abb. Pr.* 268. For previous decisions in the case, see 30 *N. Y.* 33; reversing 23 *Barb.* 9.

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the inquiry, and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk.

In such cases the very point of inquiry is whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the person desiring to be insured was a man of means. This is the only inquiry by which the real importance of the inquiry and answers can be ascertained.

For these reasons I think the learned justice who tried this cause erred in rejecting the question put to Dr. Staats, as to the effect upon his mind and action in respect to said application ; and the judgment, should, for this reason be reversed, and a new trial ordered, costs to abide the event.

All the other judges concurred, except WRIGHT, J., who did not vote.

Judgment reversed, and new trial ordered, costs to abide event.

VAN ALEN v. FELTZ.

September, 1864.

[Reversing 33 Barb. 139; S. C. App. Pr., 277.]

A written promise is not necessary in order to take out of the statute of limitations a demand which had accrued and had not been barred when the code of procedure took effect.*

Isaac J. Van Alen sued John S. Feltz in the supreme court on two judgments of a justice of the peace. The judgments were recovered, April 18, 1846, by Geo. W. and Gersham Bulkley (the amounts being respectively \$101.15 and \$76.15), and were duly assigned by them to Van Alen, the present plaintiff, on March 31, 1856; and on July 10, 1856, he commenced the present action

* Followed in *Lansing v. Blain*, 43 N. Y. 48. Otherwise, where the debt was barred before the adoption of the code; *McLaren v. McMartin*, 36 N. Y. 88.

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The only question was as to the application of the statute of limitations.

On the trial it was proved that in June, 1852, previous to the assignment to the plaintiff, and before the statute of limitations had run against the judgments, the defendant verbally promised the plaintiffs in the judgments, who were then the owners thereof, to pay them. The judge decided that, under section 110 of the code of procedure, requiring the new promise to be in writing, such promise did not take the case out of the operation of the statute, and that the plaintiff could not recover.

Judgment was given in favor of the defendant.

The supreme court at a general term (32 Barb. 139), affirmed the judgment, they holding that the meaning of section 73 of the code, in declaring that the title (title 2), relative to the time of commencing actions, should not extend to actions already commenced, or to "cases where the right of action had already accrued," was to except from the operation of the section (§ 110) requiring the new promise or acknowledgement to be in writing, only those cases where an action had been already commenced, or should thereafter be commenced, upon a then existing and effective cause of action, which should, of itself, and without the aid of any subsequent promise or acknowledgement, be sufficient to support the action. That where the statute of limitations had once attached, it was the new promise or acknowledgement which gave vitality to the cause of action, and formed the substance of the right of action prosecuted; and that, therefore, when a promise or acknowledgement, made before the statute of limitations had run, but since the code of procedure took effect, was relied on as taking the case out of the statute, it must be in writing. From the judgment of the general term the plaintiff appealed to this court.

J. K. Porter, for plaintiff, appellant.

J. H. Reynolds, for defendant, respondent.

By THE COURT.—T. A. JOHNSON, J.—When the code went

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into operation, the right of action had already accrued upon both judgments, and the only question presented by the case, is, whether a written promise, in such a case, is necessary, to take the demand out of the operation of the statute. No question is made but that the promise would have been sufficient before the code of procedure. Section 110 of the code provides that "no acknowledgement, or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of *this title*, unless the same be contained in some writing signed by the party to be charged thereby." This is the last section of title two of the code, which relates to the time of commencing actions. The first section of this title (§ 73 of the code) contains this provision. "*This title* shall not extend to actions already commenced, or to cases where the right of action has already accrued, but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form." The right of action having accrued upon these judgments, when this title of the code became a law, such title did not extend to them, but left them to be governed by the law then in force. Such is the plain letter and reading of the provision, and I do not see that it is fairly susceptible of any different interpretation. It excludes a class of cases, embracing all upon which the right of action had already accrued. If the statute then in force had commenced running, all cases belonging to that class were left to the operation of such statute, and the provisions of title two of the code did not in any way affect them.

This precise point seems to have been decided by this court in *Winchell v. Hicks* 18 *N. Y.*, 558, 566. In that case the note became due May 2, 1847, and the two sureties had by parol acknowledged the indebtedness at some time between that period and May 3, 1852; and one of the points ruled was, that the case did not come within the provisions of the code, and the debt might be revived or continued without any written promise or acknowledgment. The point was ruled in the same way in the case in the supreme court, 21 *Barb.*, 348, and the judgment was affirmed here. It had been previously decided, that where the statute had already run against a demand when

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the code went into effect, such demand fell within the provisions of the code, and could only be revived by a written promise. That to exclude it, the cause of action must have been subsisting. *Esselstyn v. Weeks*, 12 *N. Y.* 635. The learned judge who delivered the opinion in the last case seems to have been of the opinion that section 73 of the code applied only to cases where a cause of action had previously accrued upon a new promise. But that was not the point involved or decided. The point ruled was, that the section did not apply to a case where the statute had already run, and the cause of action which had previously accrued, was no longer subsisting. That decision was undoubtedly correct, as the provision was manifestly intended to exclude only cases where the cause of action had not only accrued, but was then subsisting, and the statute in force still running. In *Winchell v. Hicks*, the cause of action had accrued, and was subsisting, when the code went into operation, and the parol promise was made afterward. It will be seen, therefore, that the precise question presented here, was involved in the latter case, and distinctly decided. The point is *res judicata*. But if it were an open question, I should have no hesitation in adopting the same conclusion. The language is too plain to admit of debate or doubt. "This title shall not extend to cases where the right of action has already accrued." To hold, in the face of this plain and unambiguous language, as we are asked by the respondent's counsel to do, that title 2 does extend to *all cases* where the right of action had already accrued when that title took effect, *excepting those only*, where such right had then been revived, or continued by a new promise, would require the exercise of legislative instead of judicial functions. It would be a sheer perversion of terms, to call such a determination, the construction or interpretation of a provision of the statutes. I am of the opinion, therefore, that the judgment is erroneous, and should be reversed, and a new trial granted, with costs to abide event.

All the judges concurred, except H. R. SELDEN, J., who was absent.

Judgment reversed and new trial ordered, costs to abide event.

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VAN ALEN v. ILLINOIS CENTRAL R. R. CO.

September, 1866.

[Affirming 7 Bond. 515.]

Defendants, a railroad corporation, in soliciting a loan of money, offered to give lenders their bonds, and the privilege of becoming stockholders in the company to half the amount of their loan. Plaintiff subscribed to the loan and received a provisional certificate declaring him to be entitled to the scrip certificates for shares of stock after a certain day fixed. At the bottom of the certificate was a memorandum, stating that the exchange of the provisional certificates for the scrip certificates was "limited to 1st January, 1857." The year was intentionally left blank, but by a vote of the company was afterward fixed at 1855. In 1857, plaintiff having paid up the whole amount of his subscription to the loan, and having offered to pay all installments that had been called on the stock with interest thereon, demanded the stock of the company which was refused. *Held*, that having accepted the terms offered by the company, and complied with all the conditions in regard to the loan, his right to the stock became absolute and was not cut off by the notice on the provisional certificate.

It seems it would have been the same if the date had been filled in when the certificate was issued.

James H. Van Alen sued the Illinois Central R. R. Co. in the N. Y. superior court on these facts. In January, 1857, plaintiff demanded from defendants nine hundred and seventy-five shares of their scrip stock, claiming a right thereto, according to the terms of "provisional certificates" for that amount of stock, then held by him and presented to defendants. At the same time he offered to pay defendants all installments that had been called upon the stock demanded, with all interest due. Defendants refused to issue or deliver the stock to plaintiff, and this action was brought for damages. Plaintiff had a verdict and judgment for the difference between the par of the stock and its market value at the time of plaintiff's demand and defendants' refusal.

The superior court, at general term, affirmed the judgment; holding that the only sense in which the provisional certificates were conditional was that they required payment of all

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the installments as a condition of the right to demand stock, and that when that condition had been fully performed, the right to demand and receive the stock continued until it was terminated by a tender of performance by the company, and a demand of payment of any assessments then duly made, and a refusal of the subscriber to accept and pay, or by some other act to which he was a party. Reported in 7 *Bosw.* 515.

Defendants appealed.

Charles Tracy, for defendants, appellants.—The provisional stock certificates were the contracts between plaintiff and defendants, in which were merged all previous negotiations, and dealings. *Kain v. Old*, 2 *Barn. & C.* 627-634; *Story on Cont.* § 671; *Chitty on Cont.* 90, c. 1 § 2, subd. 3. The stock certificates resemble a bond with a condition. *Hurlst. on Bonds*, 10. The words of the defeasance are the words of the contractee, the plaintiff, and are to be construed most favorably for the contractor, the defendant. *Butler v. Wigge*, 1 *Saund.* 66; 2 *Salk.* 95-118; *Turner v. Goodwin*, 10 *Mod.* 154. The figures "185" are senseless and to be rejected. 1 *Saund.* 66 a, note 1; *Jiggon v. Purchase, Jones*, 140. These figures being struck out there is no year mentioned, and the 1st of January means the next first of January. It is like a promise to do a thing or pay a sum on the first day of November; in which case, without expressing it, November next is meant. *Lewkner v. Smallwood*, (12 *Jac.*) 1 *Rolls Abr.* 444, "condition;" *T. 3 Vin. Abr.* "condition," *T. b.* 3; *Price v. Coa*, 1 *Rolls Abr.* 442, "condition," *M.* 3; *Anon.* 3 *Leonard*, 7 (6 *Eliz.*) *Vin. Abr.* "condition," *T. b.* 8. *Witney v. Crosby*, 3 *Caines*, 89; *Kelly v. Gilmer*, 9 *Foster*, (*N. H.*) 385, 390; *Turner v. Roby*, 7 *J. J. Marshall*, 209-211; *Prefrot's Case*, *Cro. Jac.* 646.

William M. Evarts, for plaintiff, respondent.—I. By the provisional certificates the defendants agreed that *on and after October 1, 1852*, he having lent them all the money he agreed to, plaintiff should be entitled to nine hundred and seventy-five shares of their stock at par, which they contracted to deliver to him on demand. II. The privilege to subscribe to the stock

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was unlimited as to time. The plaintiff can not be affected by the incomplete N. B. at the bottom of the certificate. The company had no power to cut off plaintiff's stock right by a notice of any kind, even if the N. B. had been filled up it would have been only a notice, and it was impossible for the company thus to clear itself of a perfect obligation. The only way in which the company could rid themselves of this stock obligation was by a tender of the shares and demand of acceptance or refusal.

BY THE COURT.—WRIGHT, J. [After stating facts.]—It is not claimed that the measure of damages is objectionable, if the plaintiff could recover at all. The sole question, therefore, is as to the defendants' liability. If the plaintiff, at the time of the demand, was entitled to nine hundred and seventy-five shares of the defendants' capital stock at par, which they refused to issue or deliver to him, the judgment is right. On the contrary, if he had no title or right to the stock, the judgment on the special verdict ought to have been given for the defendants.

The case, upon the facts admitted and appearing by the special verdict, seems to me to be a plain one, and that but little more than a statement of them is requisite. The defendants, in June, 1852, desiring to borrow \$5,000,000 on their bonds to construct their railway, issued proposals for a loan to that amount to be taken in London. The prospectus set forth that they had authorized their London agents to negotiate for the amount in their bonds, bearing interest at the rate of six per cent. per annum, payable half-yearly in London; which bonds would be issued in sums of \$500 and \$1,000 each, at a certain rate of exchange. Payments for these bonds, or deposits by lenders of the moneys for them, were proposed to be made at various periods; the first deposit, July 1, 1852, and the remaining deposits or installments at intervals of three months from that date, and ending on October 2, 1854; but the installments might be anticipated by advancing the whole subscription, which would entitle the subscriber to interest at six per cent. per annum from the date of payment. On the payment of the first deposit on the bonds, "provisional certificates" to bearer

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would be issued, and, on the remaining payments being completed, the provisional certificates would be exchanged for the bonds. The prospectus in question, after thus giving the terms of such loan, stated that the company would also create a share capital, divisible into shares of \$100 each, and went on to say: "It is proposed to give the privilege to subscribers of the loan of \$5,000,000, now offered, to become shareholders therein for half of that subscription (\$2,500,000), and as it can hardly be doubted that the bonds will be paid off by means of the sale of lands, there is every probability that the railroad will be constructed without any call upon the share capital. A small deposit may be required on the shares, and these shares will thus become an actual bonus, and entitle the holder to a participation in all the profits of the line." It was further stated that a banker's receipt would be given on payment of the first deposit on the bonds, which would be exchanged for the "provisional certificates" as soon as they could be obtained from America; and at the same time a further "provisional certificate," entitling the bearer, in addition, to fifty per cent. on the amount of his subscription to the bonds, in the capital stock of the company, would be delivered to him. The "provisional certificates" would be exchanged for scrip shares on payment of the last installment on the bonds."

The plaintiff subscribed for \$300,000 of the loan as thus proposed; paying the first installment in London, and the remaining installments in New York, in pursuance of arrangements made with the defendant. About October 1, 1852, on paying the second installment on his subscription, he received from the defendants three hundred "provisional certificates" for bonds of \$1,000 each. The counsel for the defendants errs in his statement that these were the bonds themselves delivered to and accepted by the plaintiff. They were the instruments called a "provisional bond certificate," contemplated by the proposals, that the subscribers to the loan were to receive after depositing the first installment, and were identical in form with those received by other subscribers. Each contained a stipulation that "after the payment of the last installment they would be exchanged for the definitive construction bonds." At the same time, the plaintiff received from

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the defendants, forty-three "provisional certificates" for stock, amounting to nine hundred and seventy-five shares. These provisional stock certificates bore date August 16, 1852, were signed by the defendants' president and secretary, and, after specifying the amount and number of the bonds subscribed for, were in this form: "This certifies that the bearer hereof will be entitled, on and after the first day of October next, to scrip certificates for (a specified number, corresponding with the one-half of the bonds referred to) shares of \$100 each, in the capital stock of seventeen millions of dollars of the Illinois Central Railroad Company, on presentation hereof, at the Messrs. Haywood, Kennards & Co., Bankers, London. Provided all the installments on the subscription for the bonds, numbered as above, shall then have been fully paid up." At the bottom of each of the stock certificates, thus declared, and below the signatures of the officers of the company, was this memorandum: "N. B. The exchange of the provisional certificates for the scrip certificates is limited to 1st January, 185 . ." The plaintiff anticipated the payments of the installments on the loan, paying the last in January, 1853. In January, 1857, he presented to the defendants the provisional stock certificates issued to and held by him (offering to pay them all installments that had been called on the stock, with interest thereon), and demanded his scrip. They refused to issue or deliver the stock to him.

In view of these facts, I see no ground for any defense. The defendants, soliciting a loan of money, proposed to give to lenders these bonds, bearing interest at six per cent. per annum, payable at a certain period, and also give them the privilege to become stockholders to the amount of half their subscriptions, promising them, upon paying in the first installment of the loan (which was proposed to be paid in installments), certificates entitling the bearer to that amount in their capital stock, which certificates would be exchanged for scrip shares on payment of the last installment. The plaintiff subscribed for \$300,000 of the loan. The proposals and an acceptance thereof by a subscription to the proposed loan constituted the original contract between him and the company. The terms of this contract were that the defendants should pay him interest,

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and should give him, also, an open, unrestricted privilege to subscribe for their capital stock, at par, whenever he desired to do so. The claim that there was only a right of election, on a fixed date, given to subscribers, whether they would or would not take stock, is not maintainable. It is not a proper construction of the contract created by the proposals and acceptance of them, that the option to take stock was to be exercised on payment (that is, at the time of payment) of the last instalment of the loan. When the contract was reduced to certainty, on October 1, 1852, by the issue of the provisional bonds, and the provisional certificates, no such condition of election, on a fixed day, was prescribed. The provisional bond certificate declared that, "after the payment of the last installment, these provisional certificates will be exchanged for the definitive construction bonds," and the provisional certificates of stock declared "the bearer hereof will be entitled, on and after the 1st day of October next, to scrip certificates for shares." The right to stock, after October 1, 1852, became precisely as absolute, as the right to bonds, after paying in the last installment of the loan. If it were argued that the subscriber had only a right of election to take stock, which he forfeited after a certain date, it must be equally true that he had only a right of election to take bonds, which he forfeited in the same way if he did not take them.

I repeat that I regard the case as a plain one. The plaintiff, by subscribing to the loan solicited by the defendants, purchased, for a valuable consideration, the stock issuable to him as such subscriber, upon the single condition that, before it was so issued, he should have paid in to the defendants the amount of his subscription. Whether the right thus acquired was an actual title to stock, of which the provisional certificate was a sufficient document, or a right to the stock obligatory or optional, such right could be determined, like every other right, only by contract between the parties, or by judgment against the plaintiff.

There is no ground for a pretense that his rights can be affected by the incomplete memorandum at the foot of the stock certificate. This was not filled up with any date in any of the forty-three certificates held by the plaintiff. These

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certificates were issued under a resolution of the company, adopted November 17, 1852, and when issued they had not determined the filling up of the date ; nor did they determine it until March, 1854. Meantime, they had issued these to the plaintiff with the date left blank intentionally. But the company had no power or right to cut off the plaintiff's stock right by a *notice* of any kind. The delivery and acceptance of these certificates might make a contract, but, if this date had been filled in, the plaintiff might have refused to accept them. Even if it had been filled up, and the plaintiff had accepted them thus, it would have had no more effect than a notice, and it was impossible for the company thus to clear itself of a perfect obligation. I am of the opinion that the judgment should be affirmed.

All the judges concurred.

Jadgment affirmed, with costs.

VAN ALSTYNE v. NATIONAL COMMERCIAL BANK.

September, 1868.

The wrongful detention of negotiable paper, in a sister state, by a person who claims title under a forged indorsement, does not, either in equity, or under the statute as to lost paper, entitle the true owner to recover against the drawer, without producing the paper.

James W. Van Alstyne, and another, sued the National Commercial Bank of Albany, in the supreme court, to recover the amount of a draft or check, drawn by the defendants at Albany, upon the National Bank of Commerce, in the city of New York, payable to the order of J. H. Abbott, for the sum of five thousand two hundred and eleven dollars. The plaintiffs sought to recover, without producing the draft, and while the draft was in the possession of the Second National Bank of Parkersburg, in West Virginia, which bank claimed to be the lawful holder and owner thereof, and refused to deliver the same to the plaintiffs, and was not a party to the action.

The facts material to the question decided by the court are these :

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On or about March 4, 1865, the plaintiffs purchased the draft from the defendants for their own account, paid for it and received it from the defendants. They then sent the draft to the said Parkersburg, in West Virginia, duly inclosed and addressed to J. H. Abbott, the payee therein named. He had no interest therein, but his name was inserted as payee at the request of the plaintiffs, and for their convenience in the use of funds which were expected to be obtained thereon. When the draft reached Parkersburg, J. H. Abbott, the payee, was temporarily absent, and, in expectation of its arrival, had intrusted his brother, H. C. Abbott, to deposit it in the Northwestern Bank for safe keeping. H. C. Abbott received the draft, and, as found by the referee, upon the proof on the trial herein, forged the name of his brother, the payee, on the back of the draft, obtained the money thereon from the Second National Bank of Parkersburg, to whom he delivered the draft, and fled the country to parts unknown. J. H. Abbott, on August 11, 1865, assigned to the plaintiffs all his right, title, &c., in or to the draft.

The plaintiffs demanded payment of the draft from the drawees, giving them notice of the foregoing facts. They also gave notice to the defendants of such facts, and of the refusal of the drawees to pay without the presentation of the original draft, and in all these respects the plaintiffs used due diligence.

At all times the defendants had, in the hands of the drawees, funds sufficient for the payment of the draft; and the drawees were solvent and able to pay to the defendants all the funds of the defendants in the hands of such drawees.

The plaintiffs' complaint in this action treated the draft, by reason of the facts stated, as a lost draft, and alleged a tender to the defendants of a bond of indemnity, and offered to give to the defendants a good and sufficient bond of indemnity to save them harmless of and from all other payments, costs, &c.

The defendants' answer, among other things, alleged that the Parkersburg bank held possession of the draft, claiming to be lawful owners and holders for value, and that such bank had notified the defendants of such claim, and not to issue a duplicate thereof, nor pay the same to any other person.

The defendants alleged that they had, and have always had,

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funds sufficient for the payment of the draft in the hands of the drawees, and that the drawees are ready and willing to pay it upon proper presentation. They also denied that the draft was lost, and put in issue the plaintiffs' title.

Upon the facts in substance above stated, the referee decided that the plaintiffs were entitled to recover, in this action, upon executing and delivering to the defendants a bond with two sureties, in a penalty at least double the amount of the draft, to be approved by the court, conditioned to indemnify the defendants against all claims by any person on account of the draft, and all costs, &c.

Such bond being executed and approved, judgment was ordered for the plaintiffs for the amount of the draft, and costs.

Lyman Tremaine for the plaintiffs, respondents. For the purposes of such questions as are involved, the several states are each foreign sovereignties. *Edwards on Bills*, 47. The draft was stolen, and no title passed. *Regina v. Jenkins*, 9 *Car. & P.* 38; *People v. Call*, 1 *Den.* 120. There is no laches here. *Edwards on Bills*, 392 to 398, 492; 2 *Hill*, 430; 12 *Wheat.* 213. The draft was lost within the meaning of the statute, 6 *Vesey, Jr.* 811; 5 *Am. Law Reg.* 555. *Edwards on Bills*, 392. But if not within the statute, the case is within the jurisdiction of equity. *Edwards*, 304; *Rowley v. Ball*, 3 *Cow.* 303; *Story Eq. Jur.* vol. 1, § 78-86. *Hansard v. Robinson*, 7 *Barn & C.* 90. *East India Co. v. Boddan*, 9 *Vesey*, 468; *Davis v. Dodd*, 4 *Price*, 176.

Samuel Hand submitted the case for defendants, respondents.

BY THE COURT.—WOODRUFF, J.—The plaintiffs, upon the facts alleged and proved on this trial, are equitable owners of the bill of exchange in question. If in truth no title has been acquired by the Parkersburg Bank by the negotiation thereof to them, the plaintiffs are entitled to the possession of the bill.

The question which alone it is necessary to consider, if I am correct in my conclusion upon the question is, can a party, either as legal or equitable owner of a bill of exchange, demand payment from the drawee, and on refusal charge the drawer,

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and recover the amount thereof from him without producing the bill, on showing that the bill is in another state, in the possession of one who is not a party to the suit, who has paid full value therefor, who claims title thereto, and a right to recover thereon, but to whom the bill was negotiated by a forged indorsement?

The familiar rule of commercial law, that in order to charge the drawer, the bill must be presented to the drawee, and in order to recover from the drawer, the bill must be produced, is not and can not successfully be contradicted; and that this rule is qualified by an exception in the case of lost bills is not denied.

It is not material to inquire whether a recovery by the plaintiffs, if they are entitled to recover upon the facts stated, shall be deemed warranted by our statute authorizing a recovery in a suit founded upon a bill lost while belonging to the party claiming, or must be founded upon the jurisdiction and power of a court of equity to allow such recovery in a case equitably entitling the party thereto. Our courts are now courts of law and equity. In actions in our courts the party may have any relief, legal or equitable, to which upon the facts alleged and proved, he is entitled.

It is, however, pertinent to observe, that the statute in terms gives a recovery only where the bill is lost while belonging to the party claiming.

This was within the jurisdiction and power of courts of equity before the statute. The statute, therefore, did not enlarge the jurisdiction of the court; it simply declared the party in such case entitled to recover in a suit founded on the bill.

If the bill is lost, within the meaning of that statute, it was "lost" in contemplation of a court of equity. If it was not a "lost" bill within the statute, but is, nevertheless, so situated that, in the judgment of a court of equity, it should be treated as in like condition, then the claim to recover is made in a jurisdiction competent to give relief. An illustration of the case last supposed is found in that of a bill in course of transmission by a vessel which was captured and carried into a port of the enemy while at war. 6 *Ves. Jr.* 811.

Again, it must, for the purpose of the inquiry be assumed,

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as in fact found by the referee, that the plaintiffs have used due diligence in notifying the drawers and drawees of the facts claimed by them in regard to the actual situation of the bill. And that, in respect to demand of payment and notice of non-payment, they have done all which, without the production of the bill itself, they could reasonably be required to do.

These suggestions bring us to the inquiry above stated, and enable us to present it first in a form much more simple.

Can a recovery of the amount of a bill of exchange be had in a suit against a party thereto, by the legal or equitable owners, without its production, on proof that another person has the possession thereof, claiming title, which title the plaintiffs are ready to disprove?

An affirmation of this question declares that, upon mere proof of a wrongful holding or detainer of a bill by a third person, not a party to the suit, the acceptor or drawer may be subjected to the hazard of proving such holding by the third person to be wrongful in any future claim which may be made upon him—in other words, such acceptor or drawer may be required to settle the plaintiff's dispute with an alleged wrong-doer.

No case has been called to our attention in which a recovery has been allowed in such case, and no treatise upon bills of exchange, lost or not lost, states any such proposition. This is not conclusive, perhaps, but it is some evidence that, while controversies respecting the right of recovery upon lost bills, have been numerous, no one has supposed that the wrongful detention of the bill by a third person entitled an alleged owner to recover without its production.

The very object of the rule itself which requires such production is, that the party paying may have in his possession the voucher and proof of his payment to a person entitled to payment, and an assurance or guaranty that he shall not be vexed by a claim of another thereon; and the rule is not to be dispensed with, in the face of the avowed fact that such other person holds the bill and makes such claim. Indeed, I can not suppose that a right of recovery would for a moment be claimed without the further fact that the adverse holder of the bill resided in another state.

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What should be the influence of that fact? In considering that question the same observation just suggested is equally patent, viz. : that no case or authority is found which affirms the right to recover at law or in equity, on the facts stated.

It is proper to bear in mind that the bill which is claimed to be wrongfully withheld from the plaintiffs is not in a country at war with us, to which our citizen can not resort for the recovery of the bill or its value, and from which the holder can not come to our courts and prosecute the parties: and it is further proper to suggest — and a court of equity in this state could not close its eyes to the fact — that the bill is held in a state where not only the general principles of right and wrong are recognized and enforced, but where the general rules and principles of the law, and the maxims of equity prevail as they do with us, and where remedies may be pursued, rights enforced and wrong redressed, in modes conforming to the ordinary pursuit of justice and equity.

Of so much, at least, the court must take notice, as presumptively furnishing to the plaintiffs an opportunity to assert and maintain their rights against the holders of the bill, and, if they have no title, to obtain complete redress.

In the present case not only this is true, but the bill is in a state where judicial tribunals exist by the federal laws which are common to the several states, proceeding upon like principles, legal and equitable, there and here, and to which the plaintiffs may resort.

It is, therefore, unnecessary to consider the case of a bill which, through misadventure or wrong, has come to the possession of a savage in a remote or inaccessible country, where, in every reasonable estimate of its situation, it must be declared lost.

The bill was sent voluntarily by the plaintiffs to Parkersburg. The facts found import that it was their intention that it should be negotiated there. It was negotiated there, though wrongfully, fraudulently, and by a crime, according to the result of their *ex parte* investigation of the claims of the Parkersburg Bank.

It is quite apparent, however, that there may exist grounds for their claim which the present trial has not disclosed. That bank may have evidence of the authority of H. C. Abbott to

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negotiate the draft for which, in perfect good faith, they have paid value; they may show that no forgery has been committed, and they may show facts which would estop J. H. Abbott to deny his authority; they may, if they can not show a legal title, possibly show an equitable one.

It is true that if this action can be maintained without the production of the draft, we are to take the facts to be as established by the proofs on this trial.

But the suggestions thus made are nevertheless pertinent to the inquiry, whether the adverse holding by the Parkersburg Bank creates an exception to the general rule, requiring its production in order to a recovery from the drawer.

I am clear in my own opinion, that the fact that the holder resides in another state makes no difference in this respect.

The practical effect of recognizing an exception founded on that circumstance is very important, and the inconvenience and hardships to parties to negotiable paper furnish a strong reason why a court of equity should give no countenance to it.

Let it be understood, as I am sure it has never before been understood, that whenever a controversy arises with the holder of negotiable paper residing out of the state, the claimant may sue the parties thereto here and recover, assigning that excuse for not producing and surrendering it to the drawer, acceptor, or maker — and no party to such paper will be safe. An entirely new ground for invoking equitable interposition and relief will, I think, be introduced into the law, and injustice and wrong to innocent parties to the paper will be done under color of doing equity to a claimant. For it must be remembered that the indemnity which the court prescribes as the condition of compelling payment is at best a precarious reliance.

In the ordinary fluctuations which occur in the mercantile community, for whom the rules of law and equity which we are considering are especially designed, such indemnity is liable to be utterly worthless when the party has need to look to it for protection.

If recovery is to be had in a case like the present, it can only be placed on the ground that the adverse claimant and holder is in another state.

The fact that the title is impeached by proof of forgery can

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not make any difference. That is not material to the principle involved. It would present the same question if the allegation were that possession of the bill was procured by fraud, so far as the analogy to a lost bill is relied upon; for the question in the court of equity is, first of all, is there a sufficient excuse for not producing the bill? and to answer that question the particular facts which make an alleged detention wrongful are not material.

If its being wrongfully detained by a party out of the state be an excuse, then, whether the wrong-doer claims, through an alleged forged indorsement, or through a fraudulent procurement of possession, or even by a breach of contract, to retain the bill which came rightly to his possession, can make no difference.

True, if he claims by a forged indorsement of the name of the payee, he can never recover from any of the parties, but that is not the ground of jurisdiction. If it were, and without that the court would not grant relief, it is absurd to require indemnity to the defendant against his claim, for he has none which he can maintain.

That this is so will be readily seen, if the case where the alleged wrongful holder lived within this state be again adverted to. In such case, although a holding by a forged indorsement was alleged, the owner would be compelled to proceed against him as already shown, and he could not proceed as upon a lost bill. It is the non-residence alone which creates any distinction, and therefore the nature or ground of the wrongful detention is not material to the question. It would therefore follow that if the owner of negotiable notes saw fit to take them to New Jersey, or over the line into any of our adjoining states, and alleged that he was there defrauded of the possession, or borrowed money thereon, and claimed that he had paid the loan, but the holder refused to return them, or even offered them at any of the many banks in our vicinity for discount, and alleged that they kept the notes without making such discount; in all these cases, so far as the question is whether a note is lost or in a situation in which it should be so regarded in a court of equity, because it is in another state, in the hands of a third person having no title, the rule must

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be the same as where the plaintiff's allegation is that possession was obtained through a forged indorsement.

The true ground upon which a party is allowed in equity to require the payment of a lost bill, or a bill taken by the enemy in time of war, on giving indemnity, is, that he has no other recourse. He is ready to do, and is required to do, all he can. It is inequitable that, doing this, he should lose his money. The court can not equitably require him to do what the general rule requires; it is unreasonable so to require, because it is not possible that he should do it, and hence it will be seen by examination of the cases that very satisfactory proof of the essential fact of loss of the bill is uniformly required.

The fact that the bill is out of the jurisdiction shows no such case. That fact has relevancy to the question of convenience in pressing his remedy for regaining possession, by establishing his title as against the alleged wrong-doer, but it raises a question of convenience only.

In my judgment, the claim made in this case is not only without precedent, but its recognition would be fraught with mischief, and would introduce into the law a rule dangerous in the extreme.

The judgment should be reversed.

GROVER, J., dissented, on the ground that the indorsement being a forgery and the holder being in another state without the jurisdiction of the court the bill might be treated as a lost bill.

Judgment reversed, and a new trial ordered, with costs to abide the event.

VAN BUSKIRK v. WARREN.

December, 1865.

[Affirming 24 Barb. 457; 13 Abb. Pr. 145.]

An assignment direct to creditors, to secure to them their particular demands is not an assignment in trust, and is not void as creating a trust for the grantor, contrary to 2 R. S. 135, § 1.

Upon an assignment made direct to a party having a beneficial interest

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under it, the presumption is that he accepts it. Affirmative proof of acceptance is not required, but the party impeaching it must disprove acceptance.

A transfer of chattels is not absolutely void as against creditors if unaccompanied by an immediate change of possession. Want of delivery raises a presumption of fraud, and the burden of proof to rebut the presumption is on the party claiming under the transfer.

Morris S. Van Buskirk and others brought action against Joseph M. Warren, and Charles W. Tillinghast, and also against Hannibal Green, for wrongfully taking, detaining, and converting forty-one safes, the property of the plaintiffs.

On November 3, 1857, John W. Bates, a resident of this state, executed and delivered to the plaintiffs, his creditors, who were also, with one exception, residents of this state, an assignment in good faith, to secure their claims, transferring certain property owned by him, a part of which consisted of iron safes, then in the assignor's store in Chicago, Illinois. Three days subsequent to this assignment, and without knowledge or notice of it, and before the assignees had taken possession of the safes, the defendants, who were also creditors of the assignor, and also residents of this state, by processes of attachment, duly issued pursuant to the laws of the state of Illinois, attached and levied upon said safes. Subsequently, notice of the assignment was given them, and a demand made for the safes by the assignees, which demand was refused. The actions under which the attachments were made were prosecuted to judgment, and the safes sold under executions duly issued.

Thereupon the assignees commenced these actions to recover the value of the property.

In each of the actions judgment was rendered for the plaintiffs, and affirmed on appeal to the general term. The defendants appealed to this court.

D. L. Seymour and A. J. Parker, for defendants, appellants.

John B. Gale, for plaintiffs, respondents.

BY THE COURT.—POTTER, J.—The first question to be considered in these cases is, whether the sale of the iron safes by

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Bates to the plaintiffs, on November 2, 1857, was a valid sale. It is urged that the sale was by a voluntary written assignment in trust to pay creditors, and that such assignment is void upon its face, by virtue of the provisions of our statute. 2 *R. S.* 135, § 1. There is no express trust created in the instrument in question, nor is it a general assignment in trust for the benefit of the creditors of the assignor. I am unable to distinguish this instrument, in effect, from that in the case of *Leitch v. Hollister*, 4 *N. Y.* 211. It is an assignment to creditors *themselves*, for the purpose of securing their particular demands. Neither the statute nor the principle contended for applies to such a case. If, after the payment of the particular demands it was intended to secure, there should remain over a surplus, such surplus can be reached by any other creditor, by creditor's bill, by attachment, and, perhaps, in some cases, by redemption. The conveyance is, in effect, a mortgage. If there was any trust whatever, it was not direct but incidental. It does not appear, from the face of the instrument, that a trust was the object of it; and, if the instrument had provided, in terms, that the surplus should be returned to the assignor, it would have been but the expression of what the law itself implies, and it would not, for that reason, have been void under the provisions of the statute referred to. Instead of showing a design on its face to withdraw his property from his creditors, it was the direct application of it to that object; and a preference among creditors for this purpose, even when the assignor is insolvent, is not fraud *per se*. The several modern cases in this court, of *Curtis v. Leavitt*, 15 *N. Y.* 9; *Leavitt v. Blatchford*, 17 *Id.* 521; *Dunham v. Whitehead*, 21 *Id.* 131; have clearly settled the law upon this point against the defendants. Nor can this court hold the assignment to be fraudulent in fact. The finding of the judge at the circuit upon this point, not being reversed by the general term, is conclusive. If we are right in these views, much of the argument upon the character of the instrument and the intent of the assignor in *law* and in fact is disposed of.

It is also insisted that if the assignment be not void on its face, still, that the title to the property did not pass to the assignees before the levy by the defendants' attachments, three

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days after the assignment, as there was no evidence of the plaintiffs' acceptance of the assignment before the attachments were levied. Whatever may be the common law rule in this respect, in regard to voluntary assignments in trust, where the assignee has no beneficial interest, it is not the rule where the assignment is directly to a party having a direct beneficial interest in the acceptance of the assignment. In such case, *prima facie*, the assignee accepts the title, *Townson v. Tickell*, 3 *Barn. & Ald.* 31, and the *onus* is upon the party claiming in hostility, to show that there never was an acceptance. *Nicholl v. Mumford*, 4 *Johns. Ch.* 522, 528; *Moir v. Brown*, 14 *Barb.* 39, 45. There is no provision in the statute in relation to fraudulent contracts, 2 *R. S.* 136, § 5, that makes instantaneous delivery an indispensable element to a valid sale, that would make void a sale of goods and chattels, or prevent the title thereto from passing to the vendee, even if unaccompanied by immediate possession. As against the creditors of the party making the assignment, or subsequent purchasers in good faith, it is *presumptively* fraudulent. It throws a suspicion upon the transaction, which casts the burden of proof upon the assignee to overcome. If he does overcome this presumption, if he satisfies a jury or a court, of fairness and of good faith; if he makes it appear that the sale was made without any intent to defraud such creditors or purchasers; he shows a valid sale, and the title will have passed thereby. The finding of this court settles this question of good faith. The plaintiffs overcame this legal presumption to the satisfaction of the court below, and we are not at liberty here to question that finding. When the title passed to the plaintiffs, according to the statutes of this state, the defendants were not creditors within the meaning and intent of this statute. They were merely creditors at large; they did not bring themselves within the class of persons who had a right to attack the assignment. It being thus a valid assignment in fact, and it being already shown that upon its face it is not obnoxious to the charge of creating a trust for the benefit of the assignor, or of delaying, hindering, or defrauding the creditors of the assignor, we proceed to examine the next point in the case, which I regard as the most important one to be decided.

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[This discussion is omitted, as the judgment was reversed upon this point in the supreme court of the United States.*]

If we are correct in these views the judgment should be affirmed.

All the judges concurred.

Judgment affirmed.

VANDERPOOL v. SMITH.

December, 1863.

[Affirming 1 *Daly*, 311.]

Where the plaintiff demised a tract of land to the defendants for a term years, and reserved to his own use a building thereon till a specified date before the expiration of the term, and, no demand being made by the defendants, continued to occupy the building after the time for which he had reserved it had expired; *Held*, that this did not amount to an eviction by the plaintiff since the defendants had never been in possession.

* Upon this point the opinion of the court was to the effect that no question was raised under the provision of the Constitution and act of 1790, giving full faith and credit in each state to judicial proceedings of the others; but that the case must be determined by the application of the settled principle that a voluntary conveyance for valid consideration, according to the law of the grantor's domicil, will pass his personal estate everywhere; and that an action for an injury affecting personal estate was not within the rule that a personal action for tort committed abroad does not lie unless the act was unlawful by the law of the place where committed.

Upon a writ of error, the supreme court of the United States held [reported under the name of *Green v. Van Buskirk*, 3 *Wall.* 458; 5 *Id.* 307; 7 *Id.* 189] that the effect of such attachment proceedings is within that provision of the Constitution; and that giving those proceedings full faith and credit in New York made them a defense justifying the conduct of the attaching creditor; and that the fiction by which the law of the owner's domicil governs the validity of his transfer of personal property situated elsewhere, is a principle of comity which must yield whenever the laws and policy of the state where the property is situated have prescribed a different rule of transfer from that of the state where the owner lives. The judgment affirmed by the court of appeals was, therefore, reversed by the supreme court of the United States.

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It seems, that if the tenants had demanded possession at the day appointed, refusal by the landlord to deliver up possession would not have constituted an eviction.

In both the above cases the proper remedy of the tenants is an action on the landlord's covenant.

Though the tenants, immediately upon the holding over (they not having demanded possession) notified the landlord of their intention to rescind the lease, the latter can recover rent of them for a subsequent quarter.

Jacob Vanderpool brought this action in the marine court against Thompson Smith and John W. Wilson to recover rent alleged to be due on certain real estate in New York city for the quarter ending November 1, 1861. The defense set up was eviction by the landlord, the plaintiff in this action.

It appeared at the trial that in 1860 the plaintiff demised to the defendants for a term of years a tract of land, portions of which he reserved to his own use. Among the reservations so made was the right to occupy a small building up to August 1, 1861. The plaintiff continued to occupy this building, the defendants not demanding possession of him until after August 1. On August 2, the defendants notified him that they rescinded the lease, since he had broken it; and that they should remove from the premises at once, which they proceeded to do. On August 7, the plaintiff tendered the possession of the small building referred to, which was refused.

The marine court gave judgment for the plaintiff. The New York common pleas affirmed the decision of the court below, on the ground that the evidence warranted the conclusion that the plaintiff did not intend to withhold the possession of the small building in question from the defendants, and that, consequently, there was no eviction. Reported in *1 Daly*, 311.

Defendant appealed.

———, for the defendants, appellants.

Francis Byrne, for the plaintiff, respondent.

DAVIES, J.—By the terms of this law the defendants were bound to pay the quarter's rent due to the plaintiff on the first

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day of November, 1861, and for the recovery of which this action is brought. The defense is, that the landlord, the plaintiff, evicted the defendants from a portion of the premises covered by the lease, and that, consequently, they were discharged from the payment of any rent reserved by it. Such eviction, it is alleged, consists in the circumstance that the plaintiff continued in possession of the frame building mentioned in the lease after August 1, when, by the terms of the lease, such possession was to terminate on that day. It is a well settled rule that the quiet enjoyment of the demised premises without any molestation on the part of the landlord, is an implied condition, on which the tenant is bound to pay rent. If the lessor himself expels the tenant from the whole, *or part only*, of the demised premises, the tenant is discharged from the payment of the whole rent, and the reason for the rule, why there shall be no apportionment of the rent in this case is, that it is by the wrongful act of the landlord himself, and no man may be encouraged to injure or disturb his tenant in his possession, whom, by the policy of the feudal law, he ought to protect and defend. *Taylor Land. & Ten.* § 378, and cases there cited. In the present case it is clear that this plaintiff neither evicted or expelled these defendants from the demised premises or any part thereof. Neither did he do any act to render the possession of the premises by them inconvenient or uncomfortable. He did not refuse to deliver the possession of the frame building on August 1, and receiving no information from them that they required, or wished possession thereof on that day, he might well have been led to the conclusion that it was not desired by them. The circumstance that he did not go to the defendants on August 1, and make a formal surrender of the possession of the premises is no evidence of any intent on his part to hold the same in hostility to their wishes, and thereby evict or expel them therefrom. He was rightfully in possession of the frame building, and his omission to put the defendants in possession thereof on August 1, or their neglect to take such possession, or demand the same, can not rightfully be regarded as an eviction or expulsion of the defendants therefrom. It is difficult to maintain the proposition that they were

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evicted or expelled from a building of which they never had possession, nor took any measures to obtain possession of. That an action might have been maintained by these defendants against this plaintiff for a breach of his covenant that they should peaceably have possession of the whole of the demised premises may be conceded—and it also may be conceded that they could have recovered damages, if they sustained any, by reason of the plaintiff's occupancy of the building for the six days, but these circumstances fail to make out the defendants' proposition that they have been evicted and expelled from a portion of the demised premises. *Hanks v. Virtue*, 5 *Adol. & Ellis*, 367, was an action where the plaintiff claimed to recover for breach of covenant, for, that being possessed of certain premises, the defendant entered into the premises, and upon the plaintiff's possession, and expelled and kept him out; to which the defendant pleads, that he did not enter and expel him therefrom; and it was held that such breach was not proven by evidence that the plaintiff came to take possession, but was refused entrance by defendant who continued occupying the premises, but never admitted him.

LITLEDALE, J., said: "Here an expulsion, which is a putting out did not take place, a party who comes to claim, but has never entered can not be expelled." To constitute an eviction or expulsion there must be some affirmative act on the part of the party sought to be charged with the consequences flowing therefrom. An eviction consists in taking from a tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of something which, by the agreement of the parties he ought to have enjoyed. The omission of a landlord, therefore, to perform such covenant does not amount to an eviction, and is no bar to the lessor's claim for rent. The lessee's remedy is by an action to recover damages for a breach of the covenant. *Ethridge v. Osborne*, 12 *Wend.* 529. In this case there was a failure on the part of a lessor to perform certain covenants contained in the lease which, if they had been performed, would have rendered the demised premises more valuable, and it was held that such failure furnished no bar to the lessor's claim for rent. Chief-Justice SAVAGE, in the opinion says, "an

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eviction consists in taking from the tenant some part of the demised premises of which he was in possession, not in refusing to put him in possession of something which, by the agreement he never enjoyed, a tenant can not be evicted from that which he never possessed, it is impossible, therefore, upon the assumed facts, that there can have been an eviction. Had the landlord after the raceway was dug and the water let in, and enjoyed by the tenant, subsequently diverted the water from the raceway, or a part of it, that, I think, would have amounted to an eviction." See also, *Edgerton v. Paige*, 20 *N. Y.* 281, and cases there cited.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed, with costs.

**VAN DEUZEN v. TRUSTEES OF PRESBYTERIAN
CONGREGATION.**

September, 1867.

Where land is conveyed to individuals as trustees of a religious corporation, in trust for the purposes of the corporation the statute of trusts vests the legal title in the corporation; and an action to recover possession should be brought in the name of the corporation, and the individual grantees should not join as plaintiffs.

Christopher Van Deuzen, L. Bancroft, the Methodist Episcopal Church at Fort Edward, and S. B. Lee, sued the trustees of the Presbyterian Congregation at Fort Edward, to recover possession of a church edifice and land.

The court found that in 1828, at the village of Fort Edward, (there never having theretofore been any house of worship, or church organization at or near the village) the minister of a Methodist Episcopal Church of Glen's Falls, did, in conjunction with members of that church living at Fort Edward, organize and incorporate, under the Statute, "the Methodist Episcopal Church of Fort Edward," and the certificate of incorporation, acknowledged, was forwarded to the county clerk for record; but was lost and never recorded.

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The present plaintiffs, Van Deuzen, Bancroft and others were chosen the first trustees of the corporation; and on April 28, 1829, one Walter Rogers and his wife conveyed, with full covenants, to them by name, and designating them trustees of "the Methodist Episcopal Church of Fort Edward, and their successors in office, parties of the second part, in consideration of seventy-five dollars," the receipt whereof was duly acknowledged,—and did grant, . . . "to the said parties of the second part, and to their successors in office, in trust, for the uses and purposes thereafter named, and described, forever," the land described in the complaint, "for the purpose of erecting a house or place of worship for the use of the Methodist Episcopal Church; and in the further trust and confidence that the said church shall at all times enjoy the undisturbed right and privilege on these premises of the preaching of God's holy word and the administration of the ordinances and the discipline of said church according to its established usages and customs; with the single pledge and understanding of the parties of the second part that, when said house is not occupied by said Methodist church, it shall be opened for the service of any other recognized Christian denomination." The deed was duly acknowledged and recorded, Nov. 1, 1831. Rogers was owner in fee, and was in possession of the premises at the time of said conveyance. Subsequently, in 1829 and 1830, a house of worship was erected on the lot, at a cost of about two thousand five hundred dollars, by subscriptions, raised mostly by the adherents and members of the Methodist church, and partially from adherents of the Presbyterian church in that vicinity, and some from other persons. The building was constructed by persons styling themselves "the building committee of the Methodist Episcopal church," and said committee were members and adherents of that church. On its completion it was dedicated as a Methodist Episcopal church. Upon a stone over the door were engraved the words, "First Methodist Episcopal Church of Fort Edward." From its dedication, in 1830, to May, 7, 1859, the trustees of the Methodist society had charge of the building, and during the time one of them, or the sexton of said society, uniformly kept the key. During this time the building was occupied by the

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Methodists on Sundays in the forenoon as their house of worship, and sometimes in the afternoon. Frequently in the afternoon and evenings it was occupied by the Presbyterians, and ministers of that denomination settled in the adjoining towns usually officiated at such times; and when so used, application was made to the sexton or trustee of the Methodist church for the key.

There was no organized society of Presbyterians at Fort Edward, until Jan. 17, 1854. On April 24, 1854, the defendants in this action became duly incorporated as a religious body under the name of "The Trustees of the Presbyterian Congregation at Fort Edward."

In March, 1853, three of the trustees claiming to be "trustees of the Methodist Episcopal church of Fort Edward" made application to the County Court, under the statute, to sell the said church and lot upon which it was situated; which sale was ordered, and the proceeds directed to be appropriated to the purchase of a new site or the erection of a new church in said village, as the trustees should deem advisable. Pursuant to the order, the said trustees, on May 26, 1853, executed to the plaintiff Lee, a deed for said church and church lot, for the consideration of one thousand two hundred dollars, paid by said Lee by conveying a lot for a new site valued at six hundred dollars, and paying six hundred dollars in cash, which cash was applied to the materials of the new church. Lee, at the time he took this deed, knew the terms of the Rogers deed aforesaid.

After the execution of this deed to Lee, the Methodists continued to occupy this building as a house of worship, paying Lee rent for its use till May 7, 1859, when they commenced occupying their new church edifice erected in said village, then just completed. This new edifice and its lot were paid for out of the avails of the old one, and by voluntary subscriptions from Methodists and others. From May 7, 1854, until August the same year, Lee kept the custody of the key of the old church, and during that period the property was not used for any purpose. In August, 1854, the defendants, without the permission of Lee or of any of the plaintiffs, broke open the old church and occupied it for religious worship, have

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ever since continued to occupy it for that purpose, and have repaired it and made permanent improvements upon it to the extent of some one thousand two hundred dollars, under protest and objection from Lee. Three of the first trustees, and the grantees in the deed from Rogers and wife, were dead in 1854; and the two survivors, Van Deuzen and Bancroft (plaintiffs in this action), on October 24, 1854, executed to Lee a deed of the old church premises. About the year 1844, a bell was procured by general subscription among the Methodists, Presbyterians and others, at an expense of about four hundred dollars, and placed in this old church. The petition for that purpose was circulated by the minister and officers of the Methodist church, and the subscriptions therefor were obtained by their procurement and solicitation. Three of the trustees of that church, about the time of the completion of the new church, removed this bell and placed it in the new church, where it still remains.

As conclusions of law, the court found that the Methodist Church had lawful title to the property and was entitled to the possession. That neither of the other plaintiffs had a right to recover the same in this action. That the conveyance under said order of the court, was insufficient to pass the legal title to Lee. That the equitable title was in said Lee, by reason of said proceedings for the sale of the same, and the payment of the purchase money by him, and he is entitled to a conveyance thereof, in due form, by said Methodist corporation. But the legal title remained in the Methodist Church. That the defendant has no right legal or equitable, entered into the premises unlawfully, and unjustly withheld possession. That the bell referred to was the property of the Methodist church; and was rightfully removed to the new church, and retained by plaintiff. That the Methodist church was entitled to judgment against the defendant for the possession and for costs. That the complaint be dismissed as to the three plaintiffs, Van Deuzen, Bancroft, and Lee, with costs and disbursements to the defendant against them.

The supreme Court, at general term, affirmed the judgment; entered accordingly. Defendants appealed.

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James Gibson, for defendants, appellants;—Cited 2 *R. S.* 607, 5 ed. 490; 5 ed. 552; *L.* 1844, c. 158, § 2; 3 *R. S.* 3 ed. 246; *Jackson v. Leggett* 7 *Wend.* 377; *Paddock v. Brown*, 6 *Hill*, 530; *First Baptist Society v. Rapalee*, 16 *Wend.*, 605; *Burt v. Farrar*, 24 *Barb.* 518; *Rex v. Wade*, 1 *Barn. & Ad.* 861; *Garlick v. Sangster*, 9 *Bing.* 46; *White v. Willard*, 1 *Watts*, 42; *Fager v. Campbell*, 5 *Id.* 288; 2 *Cow. & Hill notes*, (Van Cott's ed.) 794; *Welch v. Joy*, 13 *Pick.* 482; *Peckham v. Henderson*, 27 *Barb.* 207, 213; *Bishop v. Cook*, 13 *Barb.* 326; *Robinson v. Clifford*, 2 *Wash. C. C.* 1, 2; *McSpedon v. Mayor*, 7 *Bosw.* 601; *S. C.* 20 *How. Pr.* 395; *McCullough v. Moss*, 5 *Den.* 567; *Farmer's L. & T. Co. v. Carroll*, 5 *Barb.* 613; *Brady v. Mayor &c.*, of N. Y. 2 *Bosw.* 173; *S. C.* 7 *Abb. Pr.* 234; 16 *How. Pr.* 435; *Valk v. Crandall*, 1 *Sandf. Ch.* 179; *Burt v. Farrar*, 24 *Barb.* 518; *Buffalo v. Pittsburg R. R. Co. v. Hatch*, 20 *N. Y.* 159; *Jackson v. Corey*, 8 *Johns.* 385; *Co. Lit.* 8 a, 9 b; *Shep. Touchstone*, 237, 505; *Com. Dig. tit. Capacity*, b. 1; *Jackson ex dem. Hardenberg v. Schoonmaker*, 2 *Johns.* 230; *Jackson v. Hartwell*, 8 *Id.* 424; *Hornbeck v. Westbrook*, 9 *Id.* 73; *Baptist Association v. Hart*, 4 *Wheat.* 1; *Green v. Dennis*, 8 *Conn.* 292; *Jackson v. Myers*, 3 *Johns.* 388; *Same v. Davenport*, 18 *Id.* 295; *aff'd*, 20 *Id.* 537; *Touch.* 226, 509, and 1 *Mad. ch.*, 445; *Cruise on Uses*, 8, § 1 *et seq.*; *Gilbert on Uses*, 80, 44; 1 *Rep.* 25; *Crary v. Goodman*, 12 *N. Y.* (2 *Kern.*) 266; *Dobson v. Pearce*, *Id.* 156; *Vander Volgen v. Yates*, 3 *Barb. Ch.* 242; * 4 *Kent Com.* 303; 299, 300; *Burgess v. Wheat*, 1 *W. Bk.* 180, 1 *Eden.* 195; *Wood Institute*, 260; 2 *Bl. Com.* 336; *Cruise Dig. tit. Trust*, c. 1, §§ 1, 2, 38; *Fisher v. Fields*, 10 *Johns.* 495; *Attorney General v. Hewer*, 2 *Vt.* 387; *Bagshaw v. Spencer*, 2 *Atk.* 557; *Willards Eq.* 412; *Gregory v. Henderson*, 4 *Taunt.* 772; *Stanford v. Hobart*, 1 *Bro. Parl. Cas.* 288; *Hopkins v. Hopkins*, 1 *Atk.* 593; *Andrew v. N. Y. Society*, 4 *Sandf.* 156; *S. C.* 174-5; 2 *Story Eq.* §§ 1287, 1289; *Hill on Trustees*, 525, 190; *In re Mechanics' Bank*, 2 *Barb.* 446; *Attorney General v. Mayor of Coventry*, 2 *Brown Par. Cas.* 235; 1 *Kern.* 253; *Sanderson v. White*, 18 *Pick. (Mass.)* 328;

 * *Aff'd* in 9 *N. Y.* (5 *Seld.*) 219.

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Attorney General v. Hobert, *Fin. L.* 259; S. C. 4 *Viner Abr.* 499; Love v. Eade, 4 *Id.* 449; King v. Packer, 9 *Cush. (Mass.)* 81; Hadley v. Hopkins Academy, 14 *Pick. (Mass.)* 39, 240; *Ex parte* Greenhouse, 1 *Mad.* 92; Porters' Case, 1 *Co. 22 b.*; *Story Eq.* § 1143, note 2; § 1200; § 1183; note and cases cited; 2 *Jarman (Pow.) Dev.* 32; Hawley v. James, 5 *Paige*, 318;* Gibbs v. Ramsey, 2 *Ves. & B.* 297; Briggs v. Penny, 3 *Mac. & Gord.* 546; Morrill v. Lawson, 4 *Vin. Abr.* 501; *Cruise Dig.* tit. Use, c. 4 § 2; tit. *Remainder*, c. 5 § 1, *et seq.* and § 16; Wells v. Fenton, *Cro. Eliz.* 826; Attorney General v. Clarke, *Amb.* 422; Jones v. Williams, *Id.* 657; 22 *Vin. Abr. tit. Uses*, (E.) 3, 247; 4 *Id. tit. Char. Uses*, 482 (B.) 17; Waller v. Childs, *Amb.* 524; Attorney General v. Cock, 2 *Ves.* 273; Potter v. Chapin, 6 *Paige*, 650; Attorney General v. Kell, 2 *Beav.*, 579; *Tevins on Trusts*, 105; 600; Shotwell v. Mott, 2 *Sandf. Ch.* 46; Attorney General v. Cowber, 2 *Sim & Sta.* 93; Attorney General v. Laws, 8 *Hare*, 32; Milford v. Reynolds, 1 *Phil.* 185; S. C. 19 *Eng. Ch. Cas.* condensed 191, note 2; Man v. Ballet, 4 *Vin. Abr. tit. Char. Uses*, (D.) pl. 7; S. P. St. John's Coll. v. Platt, *Id. Saunders on Uses*, 63, 128; Jackson v. Alexander, 3 *Id.* 484; Jackson v. Sebrind, 16 *Id.* 515; Chudleigh's Case, 1 *Rep.* 120; Jackson v. Cadwell, 1 *Cow.* 622; Jackson v. Florence, 16 *Johns.* 47; 4 *Cruise Dig. tit.* 82, c. 10, § 22; Corwin v. Corwin, 6 *N. Y. (2 Seld.)* 342; 324; Jackson v. Cary, 16 *Johns.* 303; Bowen v. Bell, 20 *Id.* 338; Dashiell v. Attorney General, 6 *H. & J.* 1, 5; *Id.* 392; Congregational Society of Halifax v. Stark, 34 *VI.* 249; Still v. Trustees of Lansingburg, 16 *Barb.* 107; Robertson v. Bullions, 11 *N. Y. (1 Kern.)* 243; *Id.* 254, 6; Petty v. Tooker, 21 *Id.* 267; affirming Parish of Belport v. Tooker, 29 *Barb.* 256; Burrell v. Association R. Ch., 44 *Id.* 282; *Touch.* 106, 182, 197; 1 *Cruise tit. 12, Trust*, c. 2 § 2; *Com. Dig. Uses*, 99; 4 *Com. Dig. tit. Uses* (L.) citing, *Dal.* 112; *Id.* (K.) citing 1 *La.* 195; 5 *Bac. Abr.* 382, 1 pl. 4, citing Bent's Case, 2 *Lc.* 19; 2 *Fond. Eq.* 122, note; Grovenor v. Hallam, *Amb.* 643; Beckwith's Case, 2 *Rep.* 58, a; Grant v. Morse, 22 *N. Y.* 325;

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Nelson v. Ingersoll, 27 *How. Pr.* 4; Brown v. N. Y. Central R. R. Co. 26 *Id.* 32; Smith v. Coe, 29 *N. Y.* 666.

A. D. Wait, for plaintiffs, respondents;—Cited *Vielie v. Osgood*, 8 *Barb.* 131, 132, 133, 127, 128; *Baptist Church v. Witherell*, 3 *Paige*, 296; *Dutch Church v. Mott*, 7 *Id.* 77; *Adair v. Lott*, 3 *Hill*, 182; 1 *R. S.* 72, 78, §§ 10, 12; 80, § 12; *Reformed Dutch Church v. Veeder*, 4 *Wend.* 497; 2 *R. S.* 4 ed. 136, § 46; 135, § 44; *Welch v. Allen*, 21 *Wend.* 147; *Nicoll v. Walworth*, 4 *Den.* 385; *Davis v. Garr*, 6 *N. Y.* (2 *Seld.*) 124; 1 *Hilliard*, 299, § 9; 304, § 55; 353, § 20; *Sanders on Uses*, 63, 128; *Jackson v. Sisson*, 2 *Johns. Cas.* 323; *Parsons v. Miller*, 15 *Wend.* 561; 20 *Coms.* 459; *Jackson v. Cory*, 8 *Johns.* 385; 2 *Blackst. Com.* 184 (marg. page); *Swick v. Sear*, 1 *Hill*, 17; *Parsons v. Miller*, 15 *Wend.* 561, 564; *N. Y. Ins. Co. v. Thomas*, 3 *Johns. Cas.* 4; *Turner v. Burrows*, 5 *Wend.* 547; *Robertson v. Bullions*, 11 *N. Y.* (1 *Kern.*) 256, 259, 260; *Steere v. Steere*, 5 *Johns. Ch.* 3; *Voorhees v. Pres. Church of Amsterdam*, 17 *Barb.* 107; *Reddington v. Reddington*, 3 *Ridg. Irish Parl.*; *Lamphugh v. Lamphugh*, 1 *P. Wms.*; *Taylor v. Taylor*, 1 *Atk.* 386; *Dean v. Dean*, 6 *Conn.* 285; *Jewett v. Jewett*, 16 *Barb.* 150; 4 *Kent Com.* 131, 17; *Newkirk v. Newkirk*, 2 *Cai.* 352; *Schermerhorn v. Nagus*, 1 *Den.* 448; *Converse v. Kellogg*, 7 *Barb.* 596; *Hall v. Tuffts*, 18 *Pick.* 455; *Kane v. Gott*, 24 *Wend.* 667; affirming 7 *Paige*, 521; *Ayres v. Methodist Church*, 3 *Sandf.* 372, 377, 378; *Beckman v. People*, 27 *Barb.* 263, 272, 273, 291, 305; see 3 *Sandf.* 372; *Livingston v. Stickles*,* 8 *Paige*, 404; 2 *R. S.* 4 ed. 133, §§ 14, 15; *Hawley v. James*, 16 *Wend.* 61; reversing 5 *Paige*, 318; *Hone v. Van Schaick*, 20 *Wend.* 566; affirming 7 *Paige*, 221; *Revisers' Notes*, 3 *R. S.* 2 ed. 572, 612; *Yates v. Yates*, 9 *Barb.* 345, 346; *King v. Rundle*, 15 *Id.* 145; *Andrew v. N. Y. Bible & Prayer Book Soc.*, 4 *Sandf.* 181, 2, 3; *Shep. Touch.* 236; *Co. Litt.* 3 a; *Baptist Ass. v. Hart*, 4 *Wheat.* 1; *Hornbeck v. Westbrook*, 9 *Johns.* 74; *Bonbett v. Cowdrin*, 9 *Mass.* 254; *Barker v. Word*, *Id.* 419; *Lockwood v. Weed*, 2 *Conn.* 287; *Hornbeck v. Sleight*, 12 *Johns.* 198; *Spencer v. Field*, 10

*Affirmed in 7 *Hill*, 253.

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Wend. 92, 93; *Stone v. Gordon*, 3 *M. & S.* 322; *Craig v. Wells*, 11 *N. Y.* (1 *Kern.*) 323; 12 *Barb.* 460, 461; *Nicoll v. N. Y. & Erie R. R. Co.*, 12 *N. Y.* (2 *Kern.*) 121, 130; 2 *Pet. U. S.* 346; 8 *Cooke*, 68, cited in *Parsons v. Miller*; *Rogers v. Murray*, 3 *Paige*, 390; *White v. Carpenter*, 2 *Id.* 238, 240; *Sayre v. Townsends*, 15 *Wend.* 647; *Putnam v. Ritchie*, 6 *Paige*, 390; *Wetmore v. Roberts*, 10 *How. Pr.* 55; 2 *Story Eq. Jur.* §§ 799, 1237, 1238; *Craig v. Wells*, 11 *N. Y.* (1 *Kern.*) 315, all the judges concurring.

BY THE COURT.—DAVIES, Ch. J. [After reciting the findings.]—The appeal brings up for review the correctness of the judgment rendered in favor of the plaintiff, The Methodist Episcopal Church of Fort Edward, against the defendants. We are not embarrassed by the question, discussed in the opinions of the learned judges of the fourth district. When this case was first before them, upon the report of a referee before whom the same had been tried, that referee reported as a fact, that “The Methodist Episcopal Church of Fort Edward” was never incorporated, and never had a legal existence. The supreme court held, that the evidence did not authorize the referee to find this fact, and that court reversed the judgment of the referee and ordered a new trial. Upon the second trial the facts were found by the court as already detailed. We have now the fact found that said church in or about the year 1828, was duly incorporated pursuant to the statute of the State of New York in such case made and provided. The Methodist Episcopal church at Fort Edward was, therefore, a legal corporation; and, being such, the grant of the land in dispute, made on April 28, 1829, by Walter Rogers and his wife, to the then trustees of the said church, for its use, vested the title of the lands in that corporation.

1 *R. S.* 727, § 47, declared, that every person who, by virtue of any grant, assignment or devise, now is or hereafter shall be entitled to the actual possession of lands and receipt of the rents and profits thereof, shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions, as his beneficial interest.

In *Welsh v. Allen*, 21 *Wend.* 147, the supreme court held,

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that in that case the trust being merely nominal in 1830, when the Revised Statutes went into operation, it became executed in the *cestui que trust* by virtue of the forty-seventh section of the article on uses and trusts (already quoted) and consequently the plaintiff held the legal title and was entitled to maintain that action. The head-note to this case is: When a trust of lands is wholly nominal the trust becomes executed by the statute in the *cestui que trust*, who may maintain ejectment for the recovery of the lands in his own name, without a previous conveyance from the trustee. To the same effect is the case of *Nicol v. Walworth*, 4 Den. 385.

Upon the facts found by the referee, the Methodist church corporation have never parted with the legal title to the lands in dispute so vested in them, and that corporation is therefore the proper party to maintain this action.

These views are decisive of this case, and lead to an affirmance of the judgment of the supreme court.

All the judges concurred, except BOCKES, J., absent.

Judgment affirmed, with costs.

VAN DUSEN v. WORRELL.

March, 1867.

An action lies by the receiver of the property of the grantor in a warranty deed, against the grantee in such deed, to prove that the deed, though absolute in its terms, was in fact a security in the nature of a mortgage.*

In such an action the plaintiff may recover the price for which the grantee has sold the land, deducting the amount due the grantee, and a reasonable compensation for his trouble in effecting a sale.

Charles H. Van Dusen, as receiver of Philo Haskins, sued Daniel Worrell, to recover the proceeds of the sale of certain lands, or of the value thereof, with certain deductions, on the ground that the lands were conveyed to the defendant by way of mortgage for the security of a debt.

* Followed in *Stoddard v. Whiting*, 46 N. Y. 627.

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The facts were these : On June 17, 1846, Philo Haskins, the owner of land, executed to the defendant and one Joshua Worrell, his mortgage on the same, as collateral to secure a bond for two hundred dollars. On January 21, 1846, Joshua assigned his interest in the bond and mortgage to defendant. On that day defendant lent to Haskins a further sum of three hundred dollars, and Haskins and wife executed to him a warranty deed of the land. This deed was given as security for the three hundred dollars then loaned, and for the amount remaining unpaid on the bond and mortgage before mentioned. Defendant and his wife afterward sold the premises to Wm. B. Follett for the sum of one thousand four hundred dollars. This action is brought asking a judgment that Worrell was a trustee of Haskins for the balance, after deducting the three hundred dollars loaned, the amount due on the bond and mortgage, with a reasonable compensation for the trouble of the defendant, and that he be directed to pay over such balance. The referee found a balance of one thousand two hundred and twelve dollars to be due the plaintiff as receiver of Haskins, for which he rendered judgment in his favor, and the supreme court affirmed his judgment. Defendant appealed.

P. L. Ely, attorney for defendant, appellant;—Cited 2 *Story Eq. Jur.* § 1531; *Stevens v. Cooper*, 1 *Johns. Ch.* 425; *Movan v. Hays*, *Id.* 339; *Meads v. Lansing*, 1 *Hopk. Ch.* 124; *Russell v. Kinney*, 1 *Sandf. Ch.* 34; *Cook v. Eaton*, 16 *Barb.* 439; *Webb v. Rice*, 6 *Hill*, 219; *Sturtevant v. Sturtevant*, 20 *N. Y.* 39.

John T. Murray, for plaintiff, respondent.

HUNT, J. [After stating the facts]—But a single question is presented for our consideration, to wit, was it competent for the plaintiff to prove that the deed from Haskins to Worrell, although in form an absolute conveyance, was in fact, by the express agreement of the parties, a mortgage merely? This question was decided in favor of the respondent in *Hodges v. Tennessee Marine Fire Ins. Co.*, 8 *N. Y.* 416, and was again

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decided by this court in the same manner, in June, 1866, not yet reported, in the case of *Loveridge v. Oyer*.

Judgment should be affirmed, with ten per cent. damages.

PARKER, J.—The parol evidence admitted by the referee upon the trial, tending to show that the deed from Haskins to the defendant was intended as a mortgage, was properly received. *Hodges v. Tennessee Marine & Fire Ins. Co.*, 8 *N. Y.* 416; *Sturtevant v. Sturtevant*, 20 *N. Y.* 39.

The referee found the fact that it was intended as a mortgage, upon sufficient evidence. Hence his conclusion of law that the plaintiff was entitled to recover the money received by defendant upon a sale of the premises, after deducting the sums and interest which it was given to secure, and defendant's reasonable charges for effecting the sale, was one of which the defendant has no right to complain.

The judgment appealed from should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs, and five per cent. damages.

VAN ETTEN v. CURRIER.

June, 1867.

[Affirming 29 *Barb.* 644.]

A wife's title to a farm, owned by her, and carried on by her and a minor son, was cut off by foreclosure; and, while she was holding over, in the absence of her husband, she sold crops, which she had harvested before judgment in ejectment against her brought by the purchaser at the foreclosure. *Held*, that in the absence of proof of fraud, the buyer of the crops acquired good title as against the purchaser of the land at the foreclosure sale; and, as against the husband's creditors.

James Van Etten sued William Currier in the supreme court, for the conversion of hay and oats.

In May, 1852, one Russell, by arrangement between all the persons concerned, conveyed a farm to Mrs Eunice Griffin, wife

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of Epenetus Griffin; and she, with her husband, Epenetus, gave to one Colwell a purchase money mortgage, which Colwell afterwards foreclosed, buying in the premises himself, at the foreclosure sale, in August, 1853; and, then, by an action of ejectment against Griffin and wife, he obtained possession in September 1854.

Before commencement of the ejectment suit, Mr. Griffin left the State, and was absent until after his wife's dispossession; his wife with her minor children carried on the farm in his absence, using his team and tools, and raised the hay and oats, the property in which was in controversy in this action. In August, 1854, she sold this hay and oats to plaintiff, and took his note, for the price, part of which he paid before defendant's levy, but he did remove the hay and oats.

On September 24, 1854, defendant caused executions on judgments, which he had recovered against Mr. Griffin, the husband, in February, 1854, to be levied on this produce, and a sale made. At the time of the sale he had notice of plaintiff's claim.

The supreme court, on substantially the same ground as taken in the opinions in this court, affirmed judgment for the plaintiff. Reported in 29 Barb. 644. Defendant appealed.

M. B. Champlain, for defendant, appellant;—Cited Gage v. Dauchy, 38 Barb. 622; * Switzer v. Valentine, 10 How. Pr. 109; Combs v. Bateman, 10 Barb. 573; Ireland v. Johnson, 28 How. Pr. 463; S. C. 18 Abb. Pr. 392; Teed v. Teed, 44 Barb. 96; Ely v. Ormby, 12 Id. 570; Brabin v. Hyde, 30 Id. 265; † Artcher v. Zeh, 5 Hill, 200; Shepard v. Philbrick, 2 Den. 174; Aldrich v. Reynolds, 1 Barb. Ch. 613; Gillett v. Balcom, 6 Barb. 370; Lane v. King, 8 Wend. 584, 587; Dewey v. Osborn, 4 Cow. 329; 4 Johns. 215; 16 Id. 289; 20 Id. 61; Hoyt v. Van Alstyne, 15 Barb. 568; Duncan v. Spear, 11 Wend. 54; Young v. Hichens, 6 Q. B. 606; Smith v. Miller, 1 T. R. 480; Putnam v. Wyley, 8 Johns. 432; Ward v.

* Reversed in 34 N. Y. 293.

† Reversed in 32 N. Y. 519.

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Macauley, 4 *T. R.* 489 ; Gordon v. Harper, 7 *Id.* 9 ; Spencer v. Field, 10 *Wend.* 87 ; Stone v. Wood, 7 *Cow.* 453.

Z. A. Kendall, for defendant, respondent.

PORTER, J.—Unless the law has been misapplied to the facts as found by the referee, the judgment should be affirmed. Grant v. Morse, 22 *N. Y.* 323 ; Carman v. Pultz, 21 *Id.* 547. It does not appear that the judgment debtor was at any time the owner, either of the hay and oats seized by the sheriff, or of the farm on which they were raised. As between Mrs. Griffin and her husband, the premises and their produce belonged to her ; and as the referee has not found that any fraud on his creditors was either committed or meditated, there is nothing to justify the seizure of her goods in satisfaction of her husband's debts. Gage v. Dauchy, 34 *N. Y.* 293, 297 ; Buckley v. Wells, 33 *Id.* 518, 521, 522 ; Knapp v. Smith, 27 *Id.* 277.

It is claimed in behalf of the appellant, that the sale by Mrs. Griffin to the plaintiff was void under the statute of frauds. That is a question which he is not in a position to raise. He was neither a party nor a privy to the transaction he seeks to impeach. He can not assert, in her behalf, a defense which she elected to waive. The purpose of the statute of frauds is to provide a shield for the protection of parties, and not to furnish a weapon for the use of strangers and trespassers. *Brown on Stat. of Frauds*, § 130 ; Bohannon v. Pace, 6 *Dana*, 194 ; Cahill v. Bigelow, 18 *Pick.* 369 ; Bullard v. Raynor, 30 *N. Y.* 197.

The appellant also claims that Colwell, the mortgagee, acquired a retroactive title to the hay and grain in question, under the writ of possession issued on September 28. The facts found by the referee do not warrant this conclusion. The property had previously been sold to the plaintiff, and at the date of the writ it was in the custody of the sheriff, through whose wrongful act in seizing and selling it as the property of Griffin, the defendant claims to justify. The supposed title of Colwell is not set up in the answer, and even if it had been alleged, it would have been unavailing to the appellant, who

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occupies the position of a naked trespasser. *Stockwell v. Phelps*, 34 *N. Y.* 363; *Parsons v. Dickinson*, 11 *Pick.* 352; *Ely v. Ehle*, 3 *N. Y.* 506; *City Bank of New Haven v. Perkins*, 29 *Id.* 554; *Lavery v. Moore*, 33 *Id.* 658.

The judgment should be affirmed.

JOHN M. PARKER, J. [After stating above facts].—There can be no doubt that the property in question, belonged to Mrs. Griffin, and not to her husband. The farm was conveyed to her, and there are no facts shown in the case, raising a resulting trust in favor of the creditors of her husband. True, her title was cut off by the foreclosure and sale, but she still kept possession, and in her husband's absence, raised the crops which are the subject of controversy in this action. She had capacity to own and use property, real and personal, independently of her husband and his creditors. There is no foundation in the facts found, or which the evidence even tends to prove, for the assumption of the defendant's counsel, that she derived the farm directly or indirectly from her husband. Her holding over after the mortgage sale, is not therefore to be deemed his holding, but her own. Neither he nor his creditors had any right to the crops she raised upon the premises thus held, unless there were circumstances showing that she raised them for him, which do not appear in this case. *Knapp v. Smith*, 27 *N. Y.* 277; *Gage v. Dauchy*, 34 *Id.* 293.

The fact that the title to the farm was in Colwell at the time when the crops were raised does not make them his. He was then seeking to obtain possession through an action of ejectment then pending, and was not entitled to the crops harvested before he obtained judgment, but only to the *mesne profits*.* *Stockwell v. Phelps*, 34 *N. Y.* 363.).

The sale from Mrs. Griffin to the plaintiff, shown in the case, is sufficient to invest plaintiff with the title, although the language of the referee in his finding upon this question is ambiguous: "Said Eunice made an agreement with said plaintiff to sell him the oats and hay, and took his note therefor, a part of which has been paid:—" and it might be construed to mean an agreement to sell *in futuro*. Still it may, taken

* Compare *Harris v. Frink*, 3 *Lans.* 85, rev'd in 49 *N. Y.* 24.

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together, mean a present sale; and, in support of the judgment, should be so construed, the more especially as the evidence shows it to have been such.

The defendant can not, upon the case as it stands before us, set up the statute of frauds against the plaintiff's title. No such question was raised upon the trial, and we can not see from the findings that the statute was not complied with. In order to have raised that question the defendant should have procured a finding of fact, showing a want of compliance with the statute, or put into the case a request and refusal so to find, with an exception to the refusal. *Grant v. Morse*, 22 *N. Y.* 323.

The judgment appealed from is, I think, correct, and should be affirmed.

All the judges concurred, except GROVER, J., who did not vote.

Judgment affirmed, with costs.

VAN KLEEK v. LEROY.

[Affirming 37 Barb. 544.]

In an action by the seller to recover back goods from the possession of defendant, on the ground that the buyer, under whom defendant claims, procured the sale, on credit, by fraudulent representations, plaintiff may prove the fraudulent intent not to pay, either by direct statements shown to be untrue, or by circumstances tending to the same result.

A direct misrepresentation to the plaintiff having been proved, it is competent to prove similar fraudulent representations made to another person in a different transaction, as bearing upon the question of intent.

Such similar frauds, however, are not *alone* sufficient to sustain a recovery, even if it be shown that the representations were communicated to the plaintiff, and that he acted on the faith of them, unless it be also shown that the buyer, in making such representations, intended them to be so communicated.

William H. Van Kleeck sued Philip Leroy and William H. Deyo, in the supreme court, to recover certain goods, on the

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ground that they had been purchased by William F. Leroy under fraudulent representations as to his circumstances and responsibility.

A few weeks after the purchase, W. F. Leroy made an assignment to defendants, for the benefit of creditors. The property claimed was replevied from defendants shortly after the assignment.

On the trial, it appeared that W. F. Leroy had for some time been dealing on credit with plaintiff. The goods in question were purchased in December, 1870, and at the time of the purchase Leroy told plaintiff that he was responsible for all the goods he would buy, &c.

Plaintiff made inquiries of third persons in regard to Leroy's responsibility; among whom was one Kenworthy. Before the sale of the goods, Leroy had been questioned by Kenworthy in regard to a bill that K. was about to sell him, and was told by Leroy that he was worth two thousand or three thousand dollars, and was perfectly good.

The jury found a verdict for defendants. With regard to the representations to Kenworthy, the court charged as follows:

"That if the plaintiff made, or was influenced to make, the sale, upon the strength of the representations made to Kenworthy, the sale was not for that reason fraudulent, unless the jury believed that the representations were made to Kenworthy with intent that the same should be communicated to the plaintiff, and should influence his conduct."

To the latter part of the charge plaintiff excepted.

The supreme court held the charge correct, and gave judgment for defendants. Reported in 37 *Barb.* 541. Plaintiff appealed.

M. Schoonmaker, for the plaintiff, appellant.

Erastus Cooke, for the defendants, respondents.

BY THE COURT.—HUNT, J.—The general principles involved in the question now before us are well settled. A purchase of goods upon fraudulent representations of the situation of the buyer, gives no title to the fraudulent vendee. A purchase of goods, with the preconceived design not to pay for them, is a

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fraudulent purchase, subject to the same consequences. An actual insolvency at the time of the purchase, but accompanied with an honest expectation, on the part of the purchaser, that he will be able to retrieve his fortunes, and where no representation is made, does not necessarily create a fraud. *Hall v. Naylor*, 18 *N. Y.* 588; *Nichols v. Pinner*, *Id.* 295; *Hennequin v. Naylor*, 24 *N. Y.* 139; *Cary v. Hotailing*, 1 *Hill*, 311.

It has been repeatedly decided in this state that, in such cases, evidence of fraudulent purchases from parties, other than the plaintiff, might be proved on the trial, to establish the purpose and intent with which the purchase in question was made.

Thus in *Cary v. Hotailing*, *supra*, Judge COWEN said (p. 316): "On questions of intent to defraud, other acts similar to the offense charged, done at or about the same time, or when the same motive to offend may reasonably be supposed to have existed as that which is in issue, are admissible with a view to the *quo animo*. The case of fraud is among the few exceptions to the general rule, that other offenses of the accused are not relevant to establish the main charge."

In *Hall v. Naylor*, *supra*, Judge COMSTOCK says: On "the trial of such an issue the *quo animo* of the transaction is the fact to be arrived at; and it is, therefore, competent to show that the party accused was engaged in other similar frauds, at or about the same time. The transactions must be connected in point of time, and so similar in their other relations that the same motive may reasonably be imputed to them all."

It was accordingly held that the representation made to a former seller, who had become alarmed, but where debt was not due, was not competent evidence.

In *Hennequin v. Naylor*, *supra*, after laying down the general rule, Judge JAMES says: "In cases where there is no overt act of fraud, it is often very difficult to prove a dishonest purpose. In all such cases, instead of proving false representations, or other fraudulent practices, resort is had to various incidents and circumstances which are calculated to exhibit the hidden purposes of the actor's mind. So in this case: Kerr and Adams were not guilty of any overt act of fraud in the purchase of goods sought to be recovered;

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nor did they make any representations one way or the other as to their pecuniary condition, and hence proof was made of their pecuniary situation, the facts and circumstances connected therewith, and their acts and conduct in relation to their other purchases and as to this purchase, in order to determine the motive and intent with which it was made."

In each case, as it is presented in court, a substantial cause of action must be established by the plaintiff. He must prove a purchase, and a fraudulent intent existing in the mind of the purchaser, when he purchased the goods, to obtain the property without paying for it. This may be done by proof of direct statements, which are shown to be untrue, or by proof of circumstances tending to the same result. In the case before us, the purchaser made a direct representation, as testified to by the plaintiff, which would have justified the jury in finding that the purchase was fraudulent. The judge charged, in relation to this point, that "if the goods were purchased by statements which were false, and known to be so by the purchaser, no title passed."

This was a sound exposition of the law, and was all that either party had a right to ask.

It was said, however, that the purchaser had made a fraudulent representation to Mr. Kenworthy, upon making a purchase from him, at about the same time. Proof of this fact was made, and it would have been erroneous to have excluded it. It was competent evidence of a distinct offense, to establish the *quo animo* in the case in hand.

It was not, however, of itself competent to establish the plaintiff's cause of action. On the trial of a prisoner charged with passing counterfeit money, it is competent to prove that the accused offered similar money at about the same time to other persons, but upon the question of intent only. Proof that he attempted to pass his spurious money upon a dozen other persons would afford no legal evidence that he had passed it to the prosecutor, or that it was spurious. These are the points in issue to be first established by independent evidence, and when established the intent may be aided by the extrinsic transactions. There is no legal connection between an attempt to cheat one person and an attempt to cheat another. Nor is

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there any legal objection to the idea that a counterfeiter or a purchaser may intend to cheat one person, and not wish or intend to cheat another.

The fraud upon the plaintiff here must be established by competent proof. An attempt to defraud Kenworthy affords no legal evidence that the same man attempted to defraud Van Kleek. An undisciplined mind might say that if Leroy would cheat one man, he would cheat another; and it appearing that he cheated Kenworthy, I will assume that he cheated the plaintiff. This, however, is neither law nor logic.

The authorities I have cited show that this fact was competent to be proved, as bearing upon the motive and intent of Leroy in making the purchase. It was a balanced case. The plaintiff proved representations, as well as numerous facts and circumstances, tending to show that Leroy intended to defraud him in making the purchase.

The defendants showed various facts and circumstances tending to re-establish the good faith of the purchase. That being the precise point in the controversy, it became quite important to establish the fraudulent representations to Kenworthy.

If he had attempted to cheat him, the jury would give such effect to that fact as they thought proper, in determining the question of good or bad faith then before them. This fact the jury had, and this was all they were entitled to.

To hold that the fraud upon Kenworthy, which was not committed upon the plaintiff, unless the statement on which it was based, was intended by the purchaser to be communicated to him, established the plaintiff's cause of action, would be going beyond any reported case, and beyond all sound principle. *Allen v. Addington*, 7 *Wend.* 9.

The representations must be made to the seller (when representation is the mode of fraud resorted to), or must have been intended to be communicated to him. Statements to a stranger, not intended for the plaintiff, can not give a ground of action. Each case depends on its own circumstances, and must be decided on its own facts.

The judgment should be affirmed.

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All the judges concurred except GROVER, J., who delivered a dissenting opinion, and BOCKES, J., who did not vote.

Judgment affirmed, with costs.

VAN MARTER v. HOTCHKISS.

December, 1864.

This court will not reverse a judgment entered on the report of a referee, on the ground that the action was not referable, if it be one that *might* require the examination of a long account, and the affidavits on which it was ordered are not brought before the court on appeal.* The presumption is that the necessary facts were shown.

An order referring the cause for trial is not an order involving the merits, and necessarily affecting the judgment, within § 329, of the code of procedure, so as to be reviewable on a mere appeal from the judgment.

William Van Marter, brought four suits in the supreme Court against Hiram G. Hotchkiss and others, to recover for services and disbursements as an attorney, in conducting four litigations. The facts were the same in all the cases. The actions were each of them referred to a single referee, who reported in favor of the plaintiff. The printed case on the appeal contains the following order for reference.

[*Title of the action.*] "On reading and filing affidavits, *showing due cause therefor*, and on motion of C. L. Lyon, of counsel for plaintiff, and on hearing D. H. Devoe, Esq., defendant's counsel, in opposition thereto, it is hereby ordered that this cause be, and the same hereby is, referred to Hiram K. Jerome, Esq., a counsel of this court, residing at Palmyra, N. Y., as sole referee to hear and determine the same, with ten dollars costs of this motion to the successful party, in the event of the suit."

It did not appear from the case that there was any appeal to the general term from this order. The affidavits used on the motion, and referred to in the order, were not contained in

* Otherwise if the affidavits are brought up, and do not show a proper case for a referee, *Kain v. Delano*, 11 Abb. Pr. N. S. 37.

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the return ; and no objection appeared to have been taken on the trial to the case being heard before the referees. Both parties were examined as witnesses in their own behalf, respectively on the merits, and no exception was taken to the report.

The only point made by the appellant was that the order of reference was illegal and unauthorized.

D. H. Devoe, for defendants, appellants.

George H. Arnold, for plaintiff.

DENIO, Ch. J. [After stating facts.]—The position taken in the appellant's points are, first, that compulsory references are a violation of the constitutional guaranty of the right of trial by jury ; and, second, that this being an action, as it is said, to recover a single item, it is impossible that there could have been a long account.

It is difficult to conceive that these objections are seriously made. The practice of referring issues, the *trial* of which would require the examination of a long account, had prevailed, by the practice of the courts, if not since the establishment of the State government, certainly from the time whereof the memory of the profession runneth not to the contrary, when the last constitution was adopted. The provision of that instrument, as well as of the prior State constitutions, respecting the trial by jury, was not that it should be used in all cases, but that in all cases in which it had been theretofore used it should remain inviolate forever. Const. of 1845, § 2. That language was, without doubt, employed for the purpose of retaining, or allowing the legislature to retain, the other modes of trial which it had been the practice to resort to in exceptional cases.

If it were conceded that we could, on an appeal from a judgment, examine the evidence upon which an order for reference had been made, which is a point not necessary to be decided, we could not do so in this case, where the affidavits read on the motion for the reference have not been returned. The action being upon contract, it might or might not require the examination of a long account, and we are to presume that

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the evidence produced on the motion authorized the order which was made. If we look into the complaint and the evidence upon the trial contained in this case, it will be apparent that the issue was one to which a reference was peculiarly applicable.

The appeal was wholly without merits, and the judgment appealed from ought to be affirmed, with damages for the delay.

T. A. JOHNSON, J.—There is manifestly nothing in either of these cases which this court can review. The actions are all between attorney and client, to recover compensation for services rendered, and disbursements made professionally. There is no exception to the report of the referee, and no question was raised in the course of the trial on which any point is made by the appellant's counsel.

The only ground of error alleged is, that the cause was improperly referred to be tried and determined. It is claimed on behalf of the appellant that the court had no authority to refer, and that the order of reference is wholly void, and gave referee no jurisdiction, and consequently the report and the judgment rendered upon it are wholly void. The appeal has evidently been brought to this court for the purpose merely of having the order of reference reviewed. But it is quite obvious that that order can not be reviewed in this way here. It is not an order involving the merits and necessarily affecting the judgment within section 320 of the code, and is not brought up by a general appeal from the judgment. It involves a mere question of practice and nothing more. There is no ground whatever for the assumption that the action was taken out of court by the reference, and all jurisdiction over it thereby lost. These are all cases which might have been properly referred, upon the necessary facts being shown. The presumption is that the necessary facts were shown, as nothing appears in the case to the contrary. Nothing appears in either of the cases on the subject of the reference, at the time it was made, except the rule by which it was ordered. The rule recites in each case that the reference was made "on reading and filing affidavits showing cause therefor." The presumption is, there-

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fore, that sufficient cause was shown to authorize the reference, Nothing is presumed here in favor of the party alleging error, but the error must appear upon the record. *Carman v. Pultz*, 21 *N. Y.* 547. There is not even an exception to the decision granting the order. So that if the appeal brought up the decision granting the order of reference for review, it would necessarily be sustained as the case stands. I think the appeals are wholly without merit or excuse, and that judgment should be affirmed, with all the allowance which the law authorizes.

All the judges concurred

Judgment affirmed, with costs, and ten per cent. damages.

VAN VECHTEN v. GRIFFITHS.

September, 1864.

The remedy for error in comments on the facts, made by the judge at the trial, is by asking for fuller explanations or for a submission of the question to the jury, without doing which an exception does not lie to his mere comments or expression of opinion on the testimony.

A request to charge should be couched in clear and unequivocal terms, to render available an exception to the judge's refusal to comply.

A decree on a libel *in rem* against a ship, for supplies furnished her, does not necessarily determine the title to the ship; and therefore is not competent in a subsequent action, as evidence of the ownership of the supplies so obtained, without other proof of the title to the ship.*

John Van Vechten sued John Griffiths, sheriff of Ulster, and Marius Schoonmaker and Gilbert Lefever, in the supreme court, for trespass in taking and converting plaintiff's coal. Defendants claimed that the coal belonged to one Nicholas Elmendorf, and justified the taking under a sheriff's sale to them on executions issued on judgments against Elmendorf. The main point in controversy on the trial was whether, at the time of the sheriff's sale, the coal was plaintiff's or Elmendorf's.

Plaintiff claimed that he had become, on July 17, 1854, the

* Compare *Macy v. Wheeler*, 30 *N. Y.* 231.

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owner of the steamboat *Alida*, by virtue of a sheriff's sale to him on executions issued on judgments against Nicholas Elmendorf and others, and that Elmendorf had theretofore been the acknowledged owner of the steamboat. These judgments were two in number, one in favor of Styles, another in favor of Van Etten and Lefever. Elmendorf, while owner of the steamboat, in the spring of 1854, had contracted with the Delaware & Hudson Canal Company to supply the boat with coal. The plaintiff, after purchasing the boat, employed one Morey to run the boat for him and on his account; and Morey testified that he purchased the coal in question of the Delaware & Hudson Canal Company for the plaintiff; that he was authorized to purchase, for the plaintiff, and on his account, what the boat needed.

Defendants claimed that the sale of the steamboat to plaintiff was collusive; that in fact Elmendorf was the purchaser, and that he furnished the money paid for her, and was in truth the bidder at the sheriff's sale. Evidence was given tending to show that Elmendorf advanced money to Van Vechten, at about the time of the sale; among other items that Van Vechten had received from Elmendorf, about \$9,000, and the proceeds of bank stock of the State of New York Bank, and of the Huguenot Bank; that Van Vechten was his father-in-law; and that Elmendorf, after the sale, interfered in the affairs of the boat.

On the trial, plaintiff sought to establish that one of the judgments on which the sheriff sold the coal in suit, had been paid and extinguished at the time of the sale. This was a judgment in favor of William H. Styles against Elmendorf, Marius Schoonmaker and William Masten, which Schoonmaker procured to be assigned to Cornelia E. Schoonmaker, his mother. He testified that the assignment was for his benefit, as he did not want his property sold under the judgment; that it was not his money that was paid for the assignment, but that of his mother; and the defendants offered to show that before the judgment was rendered, by an arrangement between Elmendorf and Schoonmaker, Elmendorf had assumed to pay and save Schoonmaker harmless from this very debt. This evidence was objected to by the plaintiff

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as irrelevant and improper, and excluded by the judge, and an exception taken.

The defendants also offered in evidence an exemplified copy of the records of the proceedings of the United States district court of the southern district of New York, upon the trial of a libel of the Delaware & Hudson Canal Company against the steamboat Alida, for the condemnation and sale of the vessel, her tackle, &c., to pay the amount due the libellant for the coal in controversy, with interest and costs, and the judgment and decree of the court thereon. This evidence was objected to by plaintiff, and excluded by the judge, and an exception taken.

In charging the jury, the judge, among other things, said: "If Morey is to be credited, there can be but little doubt that he both ran the boat and purchased the coal, as the agent of the plaintiff and for the plaintiff." Also, that there was no evidence of any collusion between plaintiff and Elmendorf in regard to the purchase of the steamboat; and that the nine thousand dollars and the proceeds of the State of New York Bank stock and the Huguenot Bank stock were all the moneys shown to have been Elmendorf's, or advanced by him to the plaintiff, or in regard to which there was any proof that it was Elmendorf's; and that the proof of these facts was not at all important, except as bearing on the question of ownership, and that the Alida was run for Elmendorf and not for Van Vechten. Defendants excepted to these statements. The judge further charged the jury that, if the jury were satisfied that Morey was acting as agent for Elmendorf, though he swears otherwise, then they must find for the defendants. To the remark, "though he swears otherwise," the defendants also excepted.

Defendants requested the judge to charge the jury: "That, although Morey supposed he was acting as the agent of Van Vechten, yet if Elmendorf was the man standing back, and Van Vechten was his agent, then Morey's supposition, as to the party for whom he was acting, made no difference." The judge refused to do so, and defendants excepted.

The jury found a verdict for the plaintiff.

The supreme court at general term affirmed judgment

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thereon, holding that the decree in the United States court was not pertinent on the question of the ownership of the coal, and that it was not material who owned the Styles judgment. HOGEBOM, J., a member of that court, dissented, on the ground that the evidence relative to the agreement between Elmendorf and Schoonmaker, as to the Styles judgment, should have been admitted, as it was evidence tending to show that the judgment was not yet extinguished, as under that agreement Schoonmaker would still be the equitable owner.

Defendant appealed to this court.

John H. Reynolds, for defendants, appellants.

L. Tremain, for plaintiff, respondent, as to payment of the judgment, cited *Carey v. White*, 3 Barb. 12; *Goodyear v. Watson*, 14 Id. 483; *Bank v. Walker*, 1 Hill, 652; *Bank v. Abbott*, 3 Den. 185.

HOGEBOM, J.—Most of the propositions in the judge's charge to the jury on which the appellants' counsel founds his allegations of error are manifestly comments upon the facts of the case, or expressions of opinion in regard thereto, and are not the subject of exception; and the remedy is not to except thereto, but to call the attention of the judge to them, and ask for fuller explanations in regard thereto, or demand their submission to the jury as questions of fact.

Of this nature is the remark that there was no evidence of any collusion between the plaintiff and Elmendorf in regard to the purchase of the Alida; also, the remark that the nine thousand dollars and the proceeds of the stock of the State of New York Bank and Huguenot Bank, were all the moneys shown to have belonged to Elmendorf, or to have been advanced by him to the plaintiff; and also the remark that if Morey was to be credited, there could be but little doubt that he both ran the boat and purchased the coal as the agent of the plaintiff.

The only point in regard to which I have had any hesitation was the refusal to comply with the defendants' request to

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charge in a single particular, and the rejection of a single offer of evidence. The defendants requested the court to charge that although Morey supposed he was acting as the agent of Van Vechten, yet if Elmendorf was the man standing back, and Van Vechten was his agent, then Morey's supposition as to the party for whom he was acting made no difference. The court refused to charge in this form, and the defendants' counsel excepted. I think on the whole such refusal was proper, for the following reasons :

1. It was not in itself quite clear and intelligible. It probably was intended to say that if Elmendorf was the real principal of Van Vechten, who was the apparent principal of Morey, Morey's ignorance of that fact, and supposition that Van Vechten was the real and ultimate principal, would not prejudice the defendants' right to go back to the real, though remote principal in the transaction. But the idea was not very clearly conveyed by the language used.

2. The court had already charged that if Morey was acting as agent for Elmendorf, they must find for the defendants. This embraced the substance of the instruction asked—not in the precise words proposed—but in legal effect. And it is not to be supposed that the counsel had neglected to present the application of the principle in all its various phases to the jury, or that the court would have refused a more detailed exposition of it to the jury if it had been properly and intelligibly requested.

The defendants' counsel also offered to prove that the debt in the Styles judgment was in fact, by an agreement for a valuable consideration, entered into between Elmendorf and Schoonmaker, the debt of Elmendorf to pay, and had been assumed by the latter. This evidence was twice offered and twice rejected by the court, and the defendants excepted. I adhere to the opinion I entertained when the case was in the supreme court, that this was error. Schoonmaker justified under the Styles judgment, and as he was a defendant therein, and had, moreover, by his own check, paid the same when it was assigned to his mother, Cornelia Schoonmaker, it became necessary, in order to show that the judgment was still in life and not extinguished, to prove either that the assignment was

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a *bona fide* one to the latter, paid for with her money, or taken in her name, though for the benefit of Marius Schoonmaker, in order to enable him to collect its amount of the party (Elmendorf) really and primarily liable to pay. Having this object, the testimony was, in my opinion, proper, and should have been admitted. But a suggestion is now made which was not presented in the supreme court, that although this may have been technically erroneous, it worked no practical prejudice in the final result to Schoonmaker, as the defendants justified under another judgment—that of Lefever—wholly unimpeached, and inasmuch as the jury rendered a general verdict in favor of the plaintiff against all the defendants including Lefever, it must have been founded upon the fact, ascertained by the jury and declared by their verdict, that the coal which was the subject of the controversy was the property of Van Vechten, and not of Elmendorf, at the time of the levy and sale under the judgments and executions. On reflection I regard this as a satisfactory answer to the argument based on the rejected evidence. I am not able to see that Schoonmaker has been prejudiced by its erroneous exclusion, and I therefore assent to the affirmance of the judgment of the court below.

DAVIES, J. [After stating the facts; and remarking that the verdict of the jury affirmed that the coal was the property of the plaintiff; and, if there had been no error in the admission or rejection of evidence, that the verdict must stand, and the fact affirmed by it, be regarded as established.]—The inquiry as to the arrangement between Schoonmaker and Elmendorf, was wholly immaterial upon the issue submitted to the jury, and passed upon by them, namely, whether or not Van Vechten was the owner of the coal levied upon and sold by the defendants as the property of Elmendorf. They only needed the judgments and executions against Elmendorf as a protection and justification in seizing and taking his property. The judgment could not in any sense be said to justify the taking of the plaintiff's property. Not until that issue (the only one submitted to the jury) had been found adversely to the plaintiff, did the inquiry become at all material, in reference to this or any other judgment against Elmendorf. If the coal was

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the property of the plaintiff, the defendants then became trespassers, and it is immaterial whether they took it under cover of judgment and execution, and sales thereon, or how otherwise, and it is equally immaterial whether such judgments were pretended or real, void or valid. In any event they could furnish no justification or excuse for taking and selling the plaintiff's property. It was of no importance, therefore, whether the agreement inquired about existed or not. It could only have been material in the event that the jury had found that the coal was the property of Elmendorf, and the defendants were seeking to justify themselves for taking and converting his property.

No question was made as to the Lefever judgment. That was a valid and subsisting judgment, and if the coal was the property of Elmendorf, the levy under the execution issued upon it, and the sales by virtue thereof divested Elmendorf of all right and title in the coal, and vested the same in the defendants, the purchasers at the sale. This made their title and justification upon this hypothesis complete, and they had no occasion to strengthen it by invoking the aid of the other judgment. It was assumed by the charge that the defendants had good title to the coal, and were justified in taking it, provided it was not the property of this plaintiff, and the issue was narrowed down between the parties to that simple question. The defendants could have sustained no injury by the exclusion of the offered evidence. Each of the defendants in his answer claims that the coal, at the time of the sale, was the property of Elmendorf, and in his possession, and the defendant Schoonmaker admits that he was one of the purchasers thereof at said sale and claims title thereto by virtue of said sale. He could not, therefore, fail in his defense, even if the Styles judgment had no existence, provided the defendants had established on the trial that the coal was the property of Elmendorf.

To this end the defendants offered in evidence the proceedings in the district court of the United States, whereby it appeared that the steamer Alida had been libeled by the vendors of this coal, to recover the amount thereof, and that the vessel had been condemned for the coal, with costs, &c. This was a proceeding *in rem* against the vessel, which was liable

for the coal furnished her, whoever might have been the owner of the vessel or the owner of the coal. The proceedings determined no question as to such ownership, and could have no relevancy in arriving at a solution of that question. If the statement of Morey be true, that he purchased the coal for the plaintiff, and upon his credit, then the plaintiff became the owner of it, and he was also liable to the vendors for the price thereof, as well as the vessel for which it was provided. The plaintiff was the owner of the boat, unless there was collusion between him and Elmendorf. The defendants did not ask that question to be submitted to the jury, and if it had been, and they had found that the sale of the boat to the plaintiff was collusive, and that, in fact, it still remained the property of Elmendorf, there was no evidence given upon the trial to sustain such a finding. If the boat was the property of the plaintiff, then the condemnation and sale thereof to pay for the coal, would only show that he had paid for the coal, as he had agreed to do, when he purchased it; that he had but discharged a debt due by him; and this tended in no degree to establish the position that the coal was the property of Elmendorf. The evidence was properly excluded.

I am unable to see anything objectionable in the first portion of the charge, objected to by the defendant's counsel. In it, the judge states, that if Morey is to be believed, there is little doubt, that he both ran the boat, and acted as the agent of the plaintiff, in the purchase of the coal. Morey's testimony was not sought to be impeached directly, but circumstances were adduced by the defendants, by which they sought to maintain that Morey, in running the boat, and making the purchase of the coal, acted as the agent of Elmendorf. His positive statement under oath, was that in making the purchase, and running the boat, he acted as plaintiff's agent. It was the duty of the judge thereupon, to have called the attention of the jury to this positive statement of the witness, to rebut the defendants' theory, and if his testimony was credited, it effectually demolished it. It was no error on the part of the judge, to say so to the jury. The judge was undoubtedly correct in stating to the jury, that the proof of the facts, in regard to the collusion alleged between the plaintiff and

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Elmendorf, in relation to the purchase of the boat, or in regard to the money advanced by Elmendorf to the plaintiff, and that the Alida was run for Elmendorf, and not the plaintiff, were only important as bearing on the question of ownership—that is, the question of the ownership of the coal. That was the only question at issue, and the circumstances alluded to had no significance, except as bearing upon that question. If the defendants wished any question submitted to the jury, on the subject of the collusion, or of the moneys advanced by Elmendorf, or as to Morey being his agent, the judge should have been specially requested to submit such questions, and if he had refused, an exception could have been taken. If such refusal had been error, the exception would have been available. *Graser v. Stellwagen*, 25 *N. Y.* 315; *Plumb v. Cattaraugus Mut. Ins. Co.*, 18 *Id.* 392; *Winchell v. Hicks*, *Id.* 558.

There was no error in the judge stating to the jury, in his directions to them to find a verdict for defendants, if they found that Morey was acting as the agent of Elmendorf in the purchase of the coal, that Morey had sworn otherwise. It was not withdrawing from them the decision of the question, whose agent he was, but calling their attention, when they were weighing all the circumstances bearing on that point, to the testimony of Morey himself. It was positive and unequivocal, and his testimony was not sought to be impeached. It was a controlling fact in the cause, and it was the right of the plaintiff to have it placed properly before the jury. The jury were not told to give it any undue weight, but to take into consideration, when discussing this point, what Morey had sworn to. It is difficult to see how the judge could have more impartially or candidly referred to the conflicting testimony in the case. He properly left all the facts and circumstances to the jury, for them to draw such inference, as they, in their judgment should determine. The supreme court saw no reason for disturbing their verdict on the main question, controverted on the trial, and it is not the province of this court, finding no error to have been committed on the trial, to review or interfere with the verdict of the jury upon the facts.

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The judgment should be affirmed.

All the judges concurred, except H. R. SELDEN, J., absent.

Judgment affirmed, with costs.

 VAN WYCK v. HARDY.

September, 1861.

[Affirming, 11 *Abb. Pr.* 473; 8. C. 2] *How. Pr.* 222.]

In an action for partition, the court have power, by amendment after judgment, to allow the insertion of the name of a party in the copy summons filed, and of a verification to a petition for the appointment of a guardian *ad litem*.*

Even without amendment, the omission of the name and of the verification are not fatal to the judgment.

An order for publication of summons is satisfied by the publication of a copy substantially correct. An omission of unnecessary words can not vitiate.

It is enough if the designation of the place for serving the answer, is as specific as is usual in ordinary correspondence between individuals in relation to the most important business.

"Forthwith," in the provision of the statute, as to the time of mailing, means without delay; and a reasonable time must be allowed, in view of the circumstances of each case:—in this case four days.†

A judgment in partition is not defective because the affidavits on which service of summons by publication was ordered did not allege the non-residence of the parties who were thus served, and stated on information and belief the inability to find them within the State.

It is enough to give jurisdiction that the fact that the defendants could not with due diligence be found within the State, appeared to the satisfaction of the judge to whom the application was made.

William Van Wyck and others brought this action in the supreme court for a partition of lands.

The complaint was filed in the clerk's office on October 14,

* See *Rogers v. McLean*, 34 *N. Y.* 536.

† Compare *Esterbrook v. Esterbrook*, 64 *Barb.* 421. It is not enough to show non-residence. *Peck v. Cook*, 41 *Barb.* 553. New affidavits after judgment are held not admissible to supply defects in the original. *Wortman v. Wortman*, 17 *Abb. Pr.* 72.

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1859. The copy summons filed omitted the names of S. A. Maverick and wife, who were defendants. The order of publication of summons was made on October 18, 1859. The deposit in the post-office of the summons and copy complaint for the non-resident defendants, was made on the 22nd of the same month. The reason of this delay was, that printed copies of the summons and complaint were not obtained by the plaintiff's attorney from the printer, until the evening of the 21st, and could not be obtained earlier, and were mailed as soon as practicable thereafter, on the 22nd. The summons as published in the *Evening Post*, one of the papers designated in the order of publication, omitted the words "in said city of New York," after the words "number 13 Chambers street," designating the office of the plaintiff's attorney. It stated, however, that the complaint was filed in the clerk's office of the city of New York, and was dated New York, October 14, 1859.

The petition for the appointment of a guardian for Samuel M. Thompson, a non-resident infant over fourteen years of age, was not verified by the infant or by his guardian, but was signed by the infant, and the signature verified by the affidavit of the plaintiff's attorney, who stated that he sent it to the infant, and received it back from him with his signature, the verification not being made, according to a letter from the infant, in consequence of his not having access to a judge. Judgment was entered and perfected May 21, 1860. The premises were sold by the referee on July 6, 1860, and the lot number 174 South street, part of the premises, was sold to Thomas Hitchcock, the petitioner, for ten thousand and twenty-five dollars, who signed the usual terms of sale, and paid ten per cent. upon his bid. The deed was to be delivered on August 6, 1860.

Under the advice of counsel, that the referee's deed would not convey a good title, the purchaser declined to take the deed, and the court allowed him to be discharged from his purchase, unless plaintiff among other things, should amend the summons on file, by inserting therein the names of Samuel A. Maverick, and Mary A. his wife, as defendants; and file the petition of the infant defendant, Samuel M. Thompson, in due

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form, and sworn to by him, for the appointment of Mortimer Porter, as his guardian *ad litem*, in this action.

The petitioner appealed from this order; and the plaintiff appealed from so much of it as required him to file a verified petition of Samuel M. Thompson, for the appointment of a guardian.

The supreme court, at general term affirmed the order on substantially the same grounds as those stated in the following opinion in this court; and the purchaser appealed. Reported in 11 *Abb. Pr.* 473; S. C. 20 *How. Pr.* 222.

BY THE COURT.—LOTT, J.—For the purposes of this appeal it must be assumed that the amendments, directed to be made by the court at special term, have been made, and the question is now presented, whether the court had power to make them. Of this there can be no doubt; section 173 of the code, expressly provides that, the court may, before or after judgment, amend any pleadings, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake *in any other respect*. The defects referred to, fall within that provision, and it was the object of the amendment merely to correct the omission of names in the summons, and to add a verification by the infant himself of his petition for the appointment of a guardian *ad litem*, for that suit, instead of that made by the plaintiff's attorney.

But if such power did not exist, these defects were not such as to invalidate the judgment. There is nothing in the code requiring the summons to be filed with the complaint, and it must be assumed in the absence of proof to the contrary, that, the summons served on the parties, whether personally or by publication, contained the names of all the parties, and that such summons or a copy thereof, was filed with the judgment. It was not necessary to file it before, § 281.

Nor am I aware of any law or rule of practice that makes it absolutely necessary that a petition for the appointment of a guardian *ad litem*, for an infant over fourteen years, should be verified by the infant himself *or at all*. It is sufficient that it is his act, and in this case, the affidavit of the plaintiff's attorney satisfactorily established that fact.

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No other proof appears to have been required, under the old chancery practice. See 2 *Barb. Ch.* 387; 2 *Hoffm. Ch. appendix No. 66*, and note thereto.

It is not claimed that the petition was not in fact signed by the infant, the objection only reached the degree of evidence required to satisfy the court that it was so signed; and, in my opinion, the sufficiency of the proof by which the court were satisfied of the authenticity of the signature, can not be questioned. The objection taken to the appointment of the guardian *ad litem* was, therefore, not well founded.

The other objections to the proceedings, are not covered by the amendments directed by the orders, and will be separately considered.

1. It is insisted that the omission of the words, "in the said city of New York," after "Number 13 Chambers Street," in the *summons* published in the *Evening Post*, is fatal. This position is untenable. Assuming that there can strictly be but one summons in an action, and that a copy of it must be published, yet the requirement is satisfied by the publication of a copy *substantially correct*, in all its *material* particulars. A literal and exact copy in every respect *is not requisite*. The omission of *unnecessary* words can not vitiate the proceedings. In the case before us, the summons as published, required the service of a copy of the answer on the plaintiff's attorney, at his office, Number 13 Chambers Street, without specially stating, that such office and street are in the city of New York, and the date was a part thereof. There can be no doubt, that the street referred to, would be understood to be in that city. It could have referred to no other, in the connection in which it was used. The code provides, that a summons shall require the defendant to "serve a copy of his answer on the person whose name is subscribed to the summons, at a place within this State, to be therein specified, in which there is a post-office." The date of the summons is at New York, and the fact stated therein, that the complaint has been filed in the office of the clerk of the county, in the city of New York, fairly shows that the office and street referred to are in that city, and in my opinion the place for the service of the answer was sufficiently specified within the meaning and requirements of the code.



The omitted words were not necessary for the purpose of designating that the place where service was to be made, was in that city. No person could be misled by the omission, or have any doubt as to the place intended. The designation is as specific as is usual in ordinary correspondence between individuals in relation to the most important business, and no greater particularity is called for in a summons.

2. Another objection is raised on the ground that the summons and complaint were not deposited in the post-office till the fourth day after the entry of the order, which directed the same to be deposited *forthwith*. No definition of that term is given in the code. Although, when used in a rule of court, it has been held to mean within twenty-four hours after the time when the act required is directed to be done, no such construction has been given to the term when used in a statute. Webster, among other definitions, defines it to mean "without delay." That is a reasonable meaning, and so understood it must be left to the decision of the court that is to pass on the question, to determine under the *circumstances of each case*, whether the requirement in that respect has been complied with; and we agree with the court below that there was such compliance in the present case. There were more than twenty defendants on whom the service was to be made, and the time that elapsed between the making of the order and the deposit, was not unreasonable, nor sufficient to charge the plaintiff's attorney with delay. At all events, there was not such delay as to deprive the court of jurisdiction over the party on that account alone.

3. The only other objection remaining to be noticed is, that "the affidavit on which the order for publication was made, and the order made thereon, are defective and irregular, in that the non-residence in this State, and the actual place of residence of the defendants, Thomas J. Turpin and Drusilla E. L. Dillard, are not sufficiently proved or stated."

It is conceded that those defendants are proper parties to this action, and it is not claimed or pretended that they or either of them were not in fact non-residents, nor that they could have been found within this State, nor is it denied that it was competent for the court to direct service of the sum-

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mons on them by the publication thereof, if the proper proof of those facts had been made, but the objection relates to the sufficiency of the proof given.

The question to be determined, therefore, is, whether there is such a defect in the affidavit on which the order was made, as to make the judgment founded thereon inoperative and void as to those defendants, for want of jurisdiction over them. The code provides that "when the person on whom the service of the summons is to be made, can not, after due diligence, be found within this State, and that fact appears by affidavit to the satisfaction of the court, or the judge thereof, or of the county judge of the county where the trial is to be had," and it in like manner appears . . . "that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by the publication of a summons in either of the following cases : " enumerating among others, "when he is not a resident of this State, but has property therein, and the court has jurisdiction of the subject of the action," and also, "where the subject of the action is real or personal property in this State, and the defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or in part in excluding the defendant from any interest or lien therein."

It will be seen that the above provisions do not require it to be shown that the defendants were non-residents. The action is brought for the partition of real estate in this State, in which they had an actual interest, and to which they were proper parties. It was only necessary, therefore, that it should "appear by affidavit to the satisfaction of the court or judge, they could not after due diligence be found within this State."

The affidavit on which the order in question was founded, was made by one of the plaintiffs. He states, "that the defendant, Thomas I. Turpin, resides at or near Greenville Court House aforesaid, as deponent is informed and believes," and, "that as deponent is informed and believes said defendant, Drusilla L. E. Dillard, resides in Union district, in said State of South Carolina, at or near Union Court House," and "further says, that after due and diligent search, and inquiry by this deponent, the said defendants, named in the body of the affidavit,

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can not be found in the State of New York, as he is informed, and verily believes." The said defendants, Thomas I. Turpin, and Drusilla L. E. Dillard, are included among those so named.

These allegations tend to show the fact required to be shown. It is true, that they are only stated on information and belief, but the statement that the defendants can not be found within this State, is so made, after due and diligent inquiry, made by him.

When the place of a person's residence is unknown, inquiries in relation to it must necessarily be made of others, and the only evidence that can be produced to the court, must, from the nature of the case, be based on information, derived on such inquiry, and the weight and effect to be given to such information, must depend on the knowledge and credibility of the party from whom it is derived. It is, therefore, no objection to the affidavit in question, that the facts therein are stated on information and belief merely.

It shows substantially that the information of the deponent as to those facts, was obtained on inquiry, and that his belief was founded on such *inquiry*, and a diligent search. It would unquestionably have afforded more satisfactory proof of those facts, if it had been shown what measures had been taken, and what acts of diligence had been used, and, particularly, what inquiries had been made, and of whom, and the means of knowledge, possessed by such persons, in relation to the residence of those defendants, and of the practicability of a personal service on them in this State; so that the court or judge might be better able to determine whether in fact due diligence had been used, and it may be conceded that no order ought to be made without proof of that character; but it can not be said such specification is absolutely necessary, nor can we say that the affidavit in question is of no legal effect.

It afforded some evidence to show that the defendants could not be found within this State, and as in the language of the code," that fact appeared by affidavit, to the satisfaction of the court," it was sufficient to confer jurisdiction to make the order, and we are not authorized on this appeal, to question the sufficiency of that affidavit.

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It follows, from these views, that the order of publication was properly granted, and that the court acquired jurisdiction over the defendants' affected thereby, and that the judgment, under which the sale was made, was valid and obligatory on them.

The purchaser was, therefore, properly directed to complete his purchase, and the order of the supreme court must be affirmed.

Order affirmed with costs.

VOORHEES v. HOWARD.

December, 1868.

To sustain a creditor's suit against one of several joint debtors, the legal remedy must first be exhausted against all of them, including the estate of any one that is alleged to be deceased.*

Benjamin F. Voorhees brought this action in the supreme court against John T. Howard and John C. Fremont; the complaint being an ordinary creditor's bill to reach property alleged to be in the hands of Fremont, for the purpose of applying it to satisfy two judgments held by plaintiff against the defendant John T. Howard, and his brother Joseph Howard, recovered on their joint contracts. The complaint alleged that Joseph Howard died before this action was commenced, but at what time, was not alleged nor proved; there was no allegation or proof as to Joseph's residence or property, at the time when the executions issued; and for aught that appeared, he might have been then living, and have had sufficient personal property to satisfy executions, or real property on which the judgments were liens. The only allegations in the complaint as to execution, were that executions were issued to the sheriff of the county of New York, the residence and place of business of John T., and were returned unsatisfied.

The supreme court affirmed a judgment dismissing the

* Compare *Riper v. Poppenhusen*, 43 N. Y. 68; *Stahl v. Stahl*, 2 Lane. 60; and see 51 N. Y. 519; 50 *Id.* 80.

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complaint, on the ground that the plaintiff had not shown that he had exhausted his remedy at law. Plaintiff appealed.

I. T. Williams, for plaintiff, appellant.

S. P. Nash and *E. H. Owen*, for defendants, respondents.

BY THE COURT.—BACON, J. [After stating facts.]—The remedy sought by a creditor's bill, was one well known to the courts of equity before it had been recognized, and to some extent regulated by the revised statutes. It was always necessary under both systems, that the bill should show affirmatively that an honest attempt had been made to collect the debt by the issuing and return of an execution against the judgment debtor, and where there were several defendants jointly liable thereon, that such effort had been made, and such remedy exhausted against all the judgment debtors, before jurisdiction would be entertained in chancery. The authorities are full and uniform to this effect. It is sufficient to cite *Child v. Bruce*, 4 *Paige*, 309; *Reed v. Wheaton*, 7 *Id.* 663.

This requirement has not been in any respect changed or modified by the practice as it now exists under the code. It is still just as necessary as it ever was to exhaust the legal remedy before equitable relief can be sought. Such relief is based on the same principles, notwithstanding it may be sought and obtained under a system in which the two jurisdictions are combined in the same tribunal. That tribunal extends equitable relief upon equitable principles, and the party who invokes its aid in this form must comply with the rules it has established.

Since the enactment of the code the decisions have been to the same effect, and have maintained the same principles as had before been established. This was so held in *Crippen v. Hudson*, 13 *N. Y.* 161, where the court say, that the union of legal and equitable jurisdictions in the same court does not furnish any good reason for a departure from the well established rule in equity. In *Dunlevy v. Tallmadge*, 33 *N. Y.* 457, 459, reversing *Fassett v. Talimadge*, 18 *Abb. Pr.* 48, *WRIGHT, J.*, says : "A court of equity does not intervene to enforce the payments of debts (whether individual or par.uer-

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ship debts), and it is only after the creditor has taken and exhausted all the means in his power at law, that he will be entitled to its aid to discover and apply the debtor's property to satisfy his claims. An execution must have been issued on the judgment and been returned unsatisfied. This is essential to the jurisdiction of the court, though there be nothing that could be reached by execution at law."

The plaintiff here has neither averred nor proved that his remedy at law had been exhausted upon these judgments. Although the averment, that Joseph Howard died at some time before the present suit was commenced, was a sufficient reason for not making him a defendant in the action, it did not relieve the plaintiff from the obligation of averring and proving that, as against all the defendants, the remedy at law had been exhausted. As to Mills, a third defendant in one of the judgments, there is an averment of his utter insolvency as an excuse for his omission as a defendant, and also for not seeking any remedy against him by the issuing and return of an execution; but there is no such averment in relation to Joseph Howard.

The judgment was, therefore, right, and must be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

VROOMAN v. GRIFFITHS.

December, 1863.

Where a married woman was the owner of a farm, and was proved to have been possessed of some personal property beside, and her husband was shown to have been very destitute of funds,—Held, that there was sufficient proof to warrant the inference that the tools and stock on the farm were purchased with her separate property, even though the farm was carried on by her husband.*

A wife does not, by employing her husband to carry on a farm, which is her separate property, render its proceeds, or chattels purchased by her to be used in connection with it, liable for his debts.

* See *Kelly v. Cambell*, *Kluender v. Lynch*, and *Van Etten v. Currier*, in this series; and *Owen v. Cawley*, 36 *N. Y.* 600, and cases cited.

Vrooman v. Griffiths.

Lucretia Vrooman, by Sherman Duncan, her next friend, sued John Griffiths in the supreme court, to recover the value of personal property unlawfully converted.

On the trial it appeared that the property had been seized by the defendant, then sheriff of Ulster county, under an execution against Christian B. Vrooman, plaintiff's husband. At the time of the seizure, the plaintiff was owner of a farm on which she was living with her husband, who worked the farm; and the property seized consisted of stock and agricultural implements employed thereon.

The evidence (which is stated in the opinion) was principally on the point whether the property levied on (among which were a pleasure wagon, lumber wagon, sleigh, a cow and a steer), was purchased with the separate property of the wife, or with the proceeds of the labor of the husband and his family. At the close of the plaintiff's case, the defendant moved for a nonsuit, which was refused.

The referee decided that property bought by the husband, with the proceeds of the labor of himself, wife and family, was his, and that the presumption was in favor of the husband owning the personal property on the farm worked by him, when he had the management and control of it; that as to some of the property in question, this presumption had been overcome; for the value of which he gave judgment for one hundred and fifty-five dollars thirty cents. From the judgment entered on the referee's report, the defendant appealed.

The supreme court at general term, ordered a new trial, unless the defendant consented to reduce the damages to one hundred and two dollars eighty-one cents; the amount deducted being the value of those articles which were purchased with the produce of the farm, to which the court held the plaintiff's husband was entitled, since it was a product of which the labor of himself and family formed a part.

From this decision the defendant appealed to this court.

John K. Porter and *Samuel Hand*, submitted the case for defendant, appellant.

A. J. Parker, for plaintiff, respondent.

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BY THE COURT.—BALCOM, J.—The question presented by a motion for a nonsuit, is, whether the evidence justified the referee in holding that any portion of the property which the defendant had taken and sold, belonged to the plaintiff. If it did he properly denied the motion; but if it did not, he should have granted it.

The plaintiff did not prove where she obtained the identical money she paid to David Vrooman for the pleasure wagon, or to Thomas Davis for the cow which she purchased of him, or to Isaac B. Davis for the steer she had of him. But she proved that a brother of her husband had previously given her seven hundred dollars; and she had paid only one hundred dollars toward the farm which she had bought in the town of Olive, and she was entitled to the rents, issues and profits of such farm "in the same manner, and with like effect" as if she had been unmarried; and those rents, issues and profits were not liable for the debts of her husband. *L. 1849, p. 528, c. 376.* She also showed her husband was poor; and David Vrooman testified that he did not think her husband had two dollars in the world when he sold the pleasure wagon to her. These facts clearly authorized the inference that the plaintiff paid her own money for the pleasure wagon, cow and steer; and they justified the referee in holding that those articles were the property of the plaintiff at the time the defendant took them and sold them. The fact that her husband used them in carrying on her farm, for the benefit of himself and children, as well as herself, did not render them liable for his debts, or deprive her of the right to sue for the same, when taken from the possession of her husband, and converted without her consent. *Sherman v. Elder, 24 N. Y., 381.*

These views not only lead to the conclusion that the referee properly refused to nonsuit the plaintiff, but also show that that the plaintiff was entitled to recover the value of the pleasure wagon, cow and steer.

We need not determine whether the plaintiff was entitled to recover the value of the lumber wagon and sleigh purchased of Patrick Kernan, and "paid for by produce raised on the farm;" for she has not appealed from the determination of the supreme court rejecting her claim for those articles.

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I am unable to see that it was material for the plaintiff to prove "what the fair rent" of the farm was per year. But I am of the opinion that the evidence that the farm "ought to rent for one hundred and forty dollars or one hundred and fifty dollars per year," did not prejudice the defendant at all on the trial. It was neither beneficial to the plaintiff nor prejudicial to the defendant. If, therefore, the referee erred in receiving such evidence, the error should be wholly disregarded.

It rested in the discretion of the referee, whether he would permit the plaintiff's counsel to put the leading question to Isaac B. Davis, as to who paid for one of the steers in dispute, and there was no abuse of such discretion.

The finding of the referee, that the plaintiff "purchased and paid for" the articles of property, for which she has recovered, was tantamount to finding that she paid her own money therefor and owned the same, for such is the legal inference from these facts.

The facts found by the referee, justified all his conclusions of law, so far as they were sustained by the supreme court.

A wife risks no more by permitting an insolvent husband to occupy her real estate and use and manage her personal property, than a stranger does by permitting a bankrupt to do the like with his property. She is as clearly entitled to "the rents, issues and profits" of her real estate, and the benefits of the ownership of her personal property, when occupied and used by her insolvent husband, as when occupied and used by any other insolvent person. She is not obliged to turn her husband out of her house, or off her land, or prevent him using her personal property to save the same, and all benefits accruing therefrom, from his creditors. These conclusions are so obviously just, they need only to be stated to be admitted to be correct. They are not only just, but equitable, and also legal.

For these reasons, I am of the opinion that the judgment of the supreme court should be affirmed, with costs.

All the judges concurred.

Judgment affirmed, with costs, and ten per cent. damages.

Wagner v. People.

WAGNER v. THE PEOPLE.

September, 1866.

[Affirming 54 Barb. 367.]

Where an indictment in a court of local jurisdiction alleges that the offense was committed in a city within its jurisdiction, the omission to give distinct proof that the place of committing offense was within the city is not ground for reversing a conviction if the objection was not taken at the trial.

So of the objection that the year in which the offense was committed was not expressly designated by the witnesses.

While an indictment remains in the same court in which it was found, a caption is not necessary.*

Where the evidence in a criminal case raises the question of insanity, the jury must be satisfied, beyond a reasonable doubt, that the prisoner was sane when he committed the act, but the test of sanity for this purpose is the knowledge of the difference between right and wrong.†

George Wagner was convicted and sentenced to death in the New York general sessions, for the murder of his wife, Mary Wagner. The offense was alleged to have been committed in the city of New York, July 21, 1865. On a writ of error the conviction was affirmed at the general term of the supreme court. He brought error to this court.

BY THE COURT.—HUNT, J. [After briefly stating the facts as above.]—The first ground of complaint is this: that the general sessions of the city of New York has jurisdiction only in the case of an offense committed within the territorial limits of that city, and that it was not proved that the offense was committed within the city limits, the witnesses simply speaking of the occurrence as having taken place in Broome-street. The answer to this objection is, that it was assumed throughout the trial by the prosecution and by the prisoner's counsel, that Broome-street was in the city of New York, and that the offense was committed within the city limits. No question was suggested on this point. The prisoner was

* See Conkey v. People, vol. 1 of this series, p. 418.

† Compare People v. Montgomery, 13 Abb. Pr. N. S. 200, and cases cited.

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charged in the indictment with having committed the offense within the city and county of New York, and within the first ward thereof. The trial took place in a court having jurisdiction only of offenses thus committed; the locality was proved to have been upon a portion of Broome street; Thompson-street is described as adjoining it, and other streets in the city of New York are incidentally mentioned by the witnesses who describe the transaction. Without inquiring whether this court can take judicial notice that Broome-street is in the city of New York, it is sufficient to say that the prisoner's counsel, throughout the entire trial, assumed such to be the fact, cross-examined the witnesses for the prosecution, and called witnesses on his own behalf, addressed the jury and interposed objections to the judge's charge, on that theory, and that it is now too late for him to make the objection.

2. Of a similar character is the objection, that no year is stated by the witnesses as that in which the offense was committed, but the testimony is that it took place on July 22. The indictment charged the offense as having been committed on July 22, 1865, and the trial took place on October 19, following. Here again it was assumed throughout, as would probably be the legal inference, that it was upon the July next preceding, to wit, that of 1865, and the entire trial was conducted upon that assumption. It did, however, appear from the testimony of Augustus Pottier, a witness called by the prisoner, that the prisoner left his employment and set up business for himself in February, 1865, and it appeared from other witnesses that he had been in business for himself but a few months before the commission of the offense charged.

3. It is objected that the indictment is bad, because the caption does not allege that the grand jurors "were then and there sworn and charged." While an indictment remains in the same court in which it is found, a caption is not necessary. *People v. Jewett*, 3 *Wend.* 314. The caption forms no part of the indictment.

4. The court was asked to charge that, "where the evidence establishes an hypothesis consistent with the prisoner's insane state of mind, it is the duty of the jury to adopt that hypothesis in accounting for the killing." To which the court responded:

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"Of course that is so, if you have any doubts as to the degree of the offense committed."

What was meant, precisely, by this request it is difficult to comprehend. The case is probably imperfect, as the answer is not entirely responsive to the proposition. It was probably intended to request a charge that, where the evidence established "a state of facts" consistent with the prisoner's insane condition of mind, it was the duty of the jury to give the prisoner the benefit of that evidence, or give due weight to those facts, in accounting for the killing. If so, the request in the abstract, was correct, and the proposition implied was reasonable. It was quite unimportant, however, in the present case for two reasons. First, the court had already, with great clearness and accuracy, laid down the law upon the subject of insanity. Among other statements, the judge had used this language to the jury: "Every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his acts. When the question of insanity is presented upon the evidence, the prisoner is entitled to the benefit of any doubt which may arise upon the question; that is, the jury must be satisfied, beyond all reasonable doubt, that he was sane when he committed the act; but if the jury are satisfied, beyond the reasonable doubt that the prisoner knew that the nature and quality of the act he was doing was wrong, the law holds him responsible. I have been requested to charge you that, if the prisoner committed the act in a moment of frenzy he can not be convicted of murder in the first degree. I not only charge that proposition, but if his mind was in that condition he can not be convicted of any offense. The true test of responsibility for acts committed is commonly known as the test of right and wrong. If the jury are satisfied that the prisoner knew the difference between right and wrong, in regard to the particular act in question, then the law holds him responsible for his act. If they are not so satisfied, of course it would be their duty to acquit him absolutely." This, I think, gave the prisoner the full benefit of the law, as embraced in his special request, as intended to have been made.

But again. The charge of the judge on this point, and his answer to the special request, in detail and in its entire scope,

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were gratuitous, and beyond the rights of the prisoner. The testimony in the case does not furnish a single fact, idea or suggestion, on which a claim of insanity can be based. The evidence discloses that on July 22, the prisoner had been engaged at his work, and in the after part of the day went into the room in his house where his wife was staying. After the lapse of a short period of time, shrieks and screams were heard, the by-standers rushed in and found the prisoner in the act of taking the life of his wife. She was upon the floor, the prisoner standing or kneeling above her, inflicting frequent blows with a hatchet, which he left imbedded in her brain. He fled a short distance, was pursued, arrested, and, when asked why he had committed such a deed, simply answered that he had a cause for it. This is the whole of the evidence on this point. We know nothing of the provocation to the deed, real or imaginary. We are ignorant of what took place at the last fatal interview. We only know the result. The prisoner was not greatly excited. He gave no evidence then, or before, or since, of any aberration of mind, or even of eccentricity. He was an ordinary, unmarked man, exhibiting the usual evidence of capacity and of sanity, with no evidence of delusion, of delirium, or of ignorance of his moral or social duties. He simply murdered his wife, cruelly, brutally, and remorselessly. The fact that he had been previously a man of good character formed no defense to the act, and furnished no evidence of insanity. The case called for no charge on the subject of insanity, and no exception lies for the want of it. See *Willis v. People*, 32 *N. Y.* 715.

The judgment of the court below should be affirmed, and the record remitted to the supreme court for further proceedings.

WALTON v. WALTON.

June, 1864.

An administrator *de bonis non* can maintain an action against the personal representative of an executor who had died without applying assets collected, to compel an accounting and delivery of such assets.*

* Followed in *Clapp v. Meserole*, vol. 1, of this series, p. 363.

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The complaint in such an action need not allege that the assets ever came into the hands of the defendant.

Such action is properly brought against the executor of the executor, in the representative capacity.

Horatio N. Walton, administrator *de bonis non*, sued Sarah P. Walton, executrix, &c., of William B. Walton, deceased, in the supreme court, for an account and payment of assets.

Jonathan Walton, deceased, left William B. Walton his executor, who, after receiving assets of the estate, died, leaving the defendant his executrix. The plaintiff was appointed administrator, *de bonis non*, of the unadministered assets of Jonathan, the first decedent. He thereupon demanded the assets from the executrix of William B., the deceased executor; and the demand being refused, brought the present action.

The complaint alleged that William B. Walton, deceased, was the sole surviving executor of Jonathan Walton. That he died in 1851, "leaving a large portion of the estate of Jonathan Walton unadministered."

That, after his death, administration was duly granted to plaintiff, "of the goods, chattels, credits and effects which were of Jonathan Walton, deceased, with his will annexed, which were left unadministered by William B. Walton, deceased. That said William B., as such surviving executor," had in his possession for the purpose of administration, a large amount of assets, the property of the estate of said Jonathan, and described in a schedule.

That at the time of said William B.'s death the said assets and proceeds thereof remained in his hands as such executor unaccounted for. That defendant was executrix of the will of said William B., and the action was brought against her in such capacity. By reason whereof plaintiff insisted, that as such administrator, he had a right to have an account taken of such assets and proceeds so remaining unadministered, and a decree for the delivery and payment to him as such; but defendant as executrix of said William B., neglected and refused to account with plaintiff for such unadministered assets.

The supposed unadministered assets described in the schedule annexed to the complaint consisted of three classes:

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1. Moneys received by William B. Walton, as such executor, in payment of demands belonging to Jonathan Walton, at the time of his death.

2. Real estate purchased by William B., as such executor, on his foreclosure on a mortgage, belonging to Jonathan, at the time of his death.

3. Two bonds and a note or their proceeds, executed by William B. to Jonathan, in his lifetime.

Defendant demurred to the complaint on the ground that the facts did not constitute a cause of action. Judgment was ordered for defendant on the demurrer, at special term.

The supreme court at general term affirmed the order on appeal, being of opinion that an administrator *de bonis non*, of a testator, appointed after the death of the sole executor of his will, could not maintain an action against the executor of the deceased executor's will for an account of moneys collected by the first executor, on demands due to his testator, which were in the hands of the first executor, unaccounted for at the time of his death, but which moneys are not alleged to be distinguishable from the moneys of the executor who collected them.

The opinion of the supreme court will be found in 2 *A. Pr. N. S.* 430. The plaintiff appealed to this court.

T. B. Mitchell, for the plaintiff, appellant, argued that both by the statutes of this State, 3 *R. S.* 5 ed. 202, § 6 ; 153, § 17 ; 162, §§ 44, 45 ; 747, §§ 11, 13, 17, 18 ; *L. 1858*, ch. 314, and by general principles, *Will. Eq. Jur.* 560 ; 2 *Hill*, 180, 225 ; 13 *Wend.* 591 ; 3 *Edw. Ch.* 203 ; 20 *How. Pr.* 354 ; 2 *Brack. (Va.)* 159, 164 ; 5 *Rand.* 51 ; 5 *Harr. Del.* 181, defendant was liable, in her representative capacity, and that plaintiff had power, as administrator *de bonis non*, to sue for an account.

S. W. Jackson, for defendant, respondent.—1. The possession of assets by the deceased executor is no cause of action in plaintiff ; nor is it alleged that defendant is in possession, and, if she were, a conversion would render her liable individually, not in her representative capacity.

2. The right to an account is not in plaintiff, but only in

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creditors and legatees. 2 *Bac. Abr.* 20; *Salk.* 306; 1 *Williams on Exec.* 781; *Conklin v. Egerton*, 21 *Wend.* 430; *Gilchrist v. Rea*, 9 *Paige*, 66; *Trustees, &c., v. Kellogg*, 16 *N. Y.* 83, 90; *Dakin v. Demming*, 6 *Paige*, 95; *Neale v. Hagthorp*, 7 *Gill & J.* 13; *S. C.* 3 *Bland*, 551; *Hagthorp v. Hook*, 1 *Gill & J.* 270; *Coleman v. McMurdo*, 5 *Rand.* 51; *Morris v. Morris*, 4 *Gratt.* 293; *Cheatam v. Burfoot*, 9 *Leigh.* 580; *Dykes v. Woodhouse*, 3 *Rand.* 287; 7 *J. J. Marsh.* 128; *Bradshaw v. Commonwealth*, 3 *Id.* 632; *Oldham v. Collins*, 4 *Id.* 49; *Felts v. Brown*, 7 *Id.* 147; *Slaughter v. Froman*, 5 *Monr.* 19; *Carrol v. Connet*, 2 *J. J. Marsh.* 195; *Graves v. Downey*, 3 *Monr.* 353; *Lawrence v. Lawrence*, 6 *Litt.* 123; *Abney v. Pickett*, 21 *Ala. N. S.* 739; *Chamberlain v. Bates*, 11 *Ala.* (2 *Porter*), 550; *Swink v. Snodgrass*, 17 *Ala. N. S.* 653; *Nolly v. Wilkins*, 11 *Id.* 872; *Harbin v. Levi*, 6 *Id.* 399; *Caller v. Boykin*, *Minor*, 206; *Searles v. Scott*, 14 *S. & M.* 94; *Prestidge v. Pendleton*, 24 *Miss.* 80; *Byrd v. Holloway*, 6 *S. & M.* 323; *Prosser v. Yerby*, 1 *How. (Miss.)* 87; *Stubblefield v. McRaven*, 5 *S. & M.* 130; *Kelsey v. Smith*, 1 *How. (Miss.)* 68; *Gamble v. Hamilton*, 7 *Miss.* 469; *Miller v. Womack*, 1 *Freem. Ch.* 486; *Sloan v. Johnson*, 14 *S. & M.* 47; *Smith v. Carrere*, 1 *Rich. Eq.* 123; *Villard v. Robert*, 1 *Strobh. Eq.* 393; *Miller v. Alexander*, 1 *Hill. Ch.* 25; *Thompson v. Buckner*, *Riley Ch.* 33; contra in *Quince v. Quince*, 1 *Murph.* 160; *Satterwhite v. Carson*, 3 *Ired. L.* 549; *Horskins v. Williamson*, *T. U. P. Charlt.* 145; *Thomas v. Hardwick*, 1 *Kelly*, 78; *Paschal v. Davis*, 3 *Id.*, 256; *Shorter v. Hargroves*, 11 *Ga.* 658; *Knight v. Lasseter*, 16 *Id.* 151; *Arline v. Miller*, 23 *Id.* 330; *Oglesby v. Gilmore*, 5 *Id.* 56; *Hardwick v. Thomas*, 10 *Id.* 266; *Gilbert v. Hardwick*, 11 *Id.* 599; *Young v. Kimball*, 8 *Blackf.* 167; but see *State v. Porter*, 9 *Ind.* 342; *Marsh v. People*, 15 *Ill.* 285; *Rowen v. Kirkpatrick*, 14 *Id.* 1; *Newhall v. Turney*, 14 *Id.* 338; *Weld v. McClure*, 9 *Watts*, 495; *Little v. Walton*, 23 *Pa.* 164; *Potts v. Smith*, 3 *Tawle*, 361; *Alsop v. Mather*, 8 *Conn.* 584; *Grout v. Chamberlin*, 4 *Mass.* 613. And the statutes of this State have not altered the rule. See *Goodyear v. Bloodgood*, 1 *Barb. Ch.* 617.

BY THE COURT.—HOGEBOM, J.—If this case turns upon

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the allegations in the complaint, independent of those contained in the annexed schedule, I have no doubt that the action is well brought; and I do not see that they are so far varied by the contents of the schedule that that should alter the results at which we should otherwise arrive. Those allegations are explicit, that William B. Walton, had, at his death, in his hands, a large portion of the assets of Jonathan Walton unadministered; that the plaintiff had been duly appointed administrator of such unadministered assets, and that the defendant has been duly appointed and qualified as executrix of the last will and testament of William B. Walton, deceased, and refuses to account for such unadministered assets.

Prima facie and unexplained, I do not see why this does not make out a perfect cause of action, in favor of the plaintiff against the defendant. As there is no averment in the complaint that these assets have been collected, nor in either the complaint nor the schedule, that the debts and expenses of administration of the estate of Jonathan Walton have been defrayed, there is nothing to show but that these assets are absolutely needed for such purpose; and they can only be applied to that object by the duly appointed legal representative of the estate of Jonathan Walton, deceased.

Independent of this, and for all legal purposes, the plaintiff is the sole legal representative and possessor of the unadministered assets of said deceased, and is entitled by law to the custody of the property and the possession of the assets, for the purpose of administration. He may bring suits to recover the property against any person in possession of it; trover or replevin, if it exists in specie in the condition it was at Jonathan Walton's death, or assumpsit, or other appropriate action, if it has been converted into money.

It may well be presumed from the allegations in the complaint, that the unadministered assets are in their original condition,—that is, in the shape they were at the death of Jonathan Walton. If so, there does not seem a possible doubt that the plaintiff is entitled to these from any and every person, in whose possession they may be. They belong to the plaintiff as owner,—owner in trust, it is true, for the pur-

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pose of administration, but, nevertheless, owner in fact. They are unadministered assets; they require administration; and no person in the world can perform this office upon them except the plaintiff. Indeed, if they have been rightfully or wrongfully converted into money, they are nevertheless unadministered assets of Jonathan Walton, deceased, are so charged to be in the complaint, and so admitted to be by the demurrer; and, therefore, rightly belong to the plaintiff, and to the plaintiff alone. Even if they had been rightfully converted into money by the executorial act of William B. Walton, this is but a partial administration of them; they have not been fully administered; we are bound to assume that they require further administration, for they are charged and admitted to be unadministered assets; and in the face of such an admission, we are not permitted to say that they require no further act of administration. They will be absolutely indispensable to pay debts of Jonathan Walton, deceased, and no one can employ them legitimately for such a purpose, except the plaintiff.

Wherever, therefore, they are found, in whosoever possession they may be, such person is bound to deliver them over into the possession of the plaintiff.

Regarding this right of the plaintiff, therefore, as absolute and undeniable, it seems to follow, as a necessary consequence, as has been just stated, that every person in whose possession they may be, is bound to deliver them up, or account therefor; and, therefore, that the defendant is in no legal condition successfully to resist a demand of the same.

But conceding the plaintiff's right to the possession of unadministered assets, it is averred that the action is not well brought against the defendant, for these reasons. 1. Because William B. Walton was, before his death, rightfully in possession of them, rightfully converted them into money, if he did so convert them, and rightfully retained them, for the purpose of paying debts and legacies, and distributive shares of Jonathan Walton's estate. 2. Because there is no allegation in the complaint that these assets, in whatever shape they may be, ever came into the personal possession, custody or control of the defendant. 3. Because, if they are in the defendant's

possession, the action should be against her personally, and not as representative of the estate of William B. Walton, deceased.

It may and must be conceded, that William B. Walton, as executor of Jonathan Walton, had a right to the possession of the assets, a right to convert them into money, and a right, up to the period of his death, to appropriate them to all legitimate purposes of administration of the estate. But this latter office he did not perform; and if he had converted a portion of the assets into money, he had only partially administered those assets; and assets are unadministered, in the sense of the law, until the whole work of administration upon them is consummated. Administration of assets implies such a complete disposition of them as not only to collect them from the debtor of the estate, if they are in that condition, but finally to place them in the hands of the creditor, legatee or distributee to whom, after undergoing the process of administration, they finally belong. As before stated, they had not undergone this latter process; and we are obliged, in the state of facts in which the parties have presented the case to us, to assume that the assets required further administration.

While, then, it might safely be conceded that William B. Walton might rightfully retain the assets in his hands, even up to the period of his death, for the purpose of paying debts, legacies, and distributive shares, that right ceased at his death. It did not devolve upon his executor, but upon his successor in the trust; it did not go to the defendant, but to the plaintiff. The plaintiff, and not the defendant, succeeded him in the administration of the estate of Jonathan Walton.

The state of the assets at the death of William B. Walton, as developed in the schedule annexed to the plaintiff's complaint is properly classified in the defendant's points under three several heads.

1. Moneys received by William B. Walton, as executor of Jonathan Walton, received in payment of bonds, notes and other demands, belonging to the said Jonathan Walton at the time of his death.

As to these I have already expressed the opinion that they were only partially administered; that they were still, in the

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eye of the law, considered in connection with the admitted allegations in the complaint, unadministered assets; that in the latter character they necessarily passed, or rightfully would pass, into the legal custody and control of the plaintiff.

2. Two bonds and a note, executed by the said William B. Walton, to the said Jonathan Walton in his lifetime, or the amount thereof.

It does not expressly appear whether these had or had not been converted into money. If they had not been, the plaintiff was clearly entitled to the securities themselves, as a portion of the unadministered assets of Jonathan Walton. If they had been converted into money, then they are placed in the same category with the other partially administered assets referred to, of the same estate.

3. Real estate bid in by William B. Walton, as executor of Jonathan Walton, deceased, on a foreclosure by William B. Walton, as such executor, of a mortgage executed on said real estate to Jonathan Walton; such real estate, subsequent to such bid, being occupied by William B. Walton at the time of his death, and by the defendant, as his executrix, subsequently, and being still occupied by the latter.

This purchase was necessarily, in judgment of law, as it appears to have been, according to the intention of the purchaser, a purchase for the benefit of the estate of Jonathan Walton. Such estate, or its legal representatives, would have a right to elect to take the benefit of such purchase, or to hold the purchaser responsible for the value of the property, or the amount of the investment. Such election has not been made. And the plaintiff, through the instrumentality of the court, has a right to hold the estate of William B. Walton accountable in some one or other of these modes for his property, and to require an account of the moneys due on the mortgage securities, an account of the rents and profits, and of the value of the estate.

Whether, therefore, we regard the assets in their unadministered form as charged in the body of the complaint, or in their partially administered condition as set forth in the schedule appended to the complaint, there seems to be abundant

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alimant for such account as is demanded by the complaint in this action.

It is objected that there is no allegation in the complaint that these assets ever came into the possession of the defendant. It is not necessary there should be. It is sufficient that they were in the hands of William B. Walton, unadministered, at the time of his death. That makes his estate liable to account for the same. The defendant is the representative of that estate, and as such, the proper party to answer such a charge. But I think the legal presumption without an express allegation is that the property in the possession of William B. Walton, at the time of his death, passed into the hands of his executrix, and that if, in fact, it be otherwise, it is with her to rebut that legal presumption by an express allegation to that effect in the answer to the complaint. Further than this, it expressly appears therein, by the schedule annexed to the complaint, that she is in possession of them as his executrix of the real estate bid in on the mortgage foreclosure, and there is, therefore, a portion of the property for which she is liable to account.

3. It is further objected that the plaintiff's remedy, if available against the defendant at all, is so only against her personally, and not as executrix of the will of William B. Walton, deceased. This is not an effectual answer to the whole complaint for two reasons. 1. Because as to such property as was in the hands of William B. Walton unadministered at the time of his death, his estate, and consequently the defendant as executrix, is liable for it. If, therefore, the defendant did not come into possession of the property, the estate, and consequently herself as its representative, is responsible for it as being in the possession of William at the time of his death. If it did pass into her possession, as executrix, there is an increased propriety that as such executrix she should be accountable for it. This is sufficient to show that as to some portion of these assets, she is properly prosecuted as executrix.

Whether as to the other portions of them, for example, goods and chattels, bonds and securities, which are in her hands in specie, in the same condition they were at the death of Jonathan Walton (if there be any such), she may not be liable for

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them individually, it is not necessary to determine. I think, however, she would also be liable for them in their representative capacity, for she recovered them as such, she holds them as such, she claims them as such. As to real estate, the charge in the complaint is that she is in possession of it as executrix of William B. Walton, deceased, and so far it seems to be manifestly proper to hold her to account in her representative character.

I, therefore, regard the action as properly instituted, and the complaint as showing a good cause of action. I think the judgment of the special and general term of the supreme court should both be reversed with costs, and judgment should be given for the plaintiff on the demurrer, with leave to the defendant to withdraw the same and answer, on payment of costs.

A majority of the judges concurred in this opinion, H. R. SELDEN, J., dissented.

Judgment reversed, and judgment for plaintiff on the demurrer, with leave to defendant to answer, on payment of costs.

WARD v. VANDERBILT.

December, 1863.

Affirming 29 Barb. 491.

The decision in *Williams v. Vanderbilt*, 28 *N. Y.* 217, affirming 29 *Barb.* 491,) that a part owner of one of several connecting lines may be held liable as carrier over the whole route,—re-asserted.* In awarding damages against a carrier for neglect to transport a passenger according to contract, the jury may allow a reasonable compensation for the time lost by plaintiff, though no specific evidence of its value has been adduced.

Harvey Ward sued Cornelius Vanderbilt, as a common carrier of passengers from New York City to San Francisco, for neglect of duty in not transporting him without unnecessary delay or detention.

* See the similar case of *Van Buskirk v. Roberts*, in 31 *N. Y.* 661.

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In March 1859, plaintiff paid the defendant two hundred and fifty dollars for the entire trip, and received in return tickets indicating the ships, and the mode of transit across the Isthmus, by which defendant proposed to convey him to California.

The evidence on the question whether defendant was a carrier for the whole route, established that he advertised the line as "Vanderbilt's new line between New York and San Francisco," giving the names of the ships on the Atlantic and Pacific, and stating that passengers would be promptly conveyed over the new transit route of the Nicaragua Company, having but twelve miles of land transportation, and directing persons desiring passage to apply only at the office of the line, No. 9 Battery-place. That plaintiff applied at that place for a passage to San Francisco; over the door of the office he found a sign "Vanderbilt's line for California," or "Vanderbilt's through line to California;" and he there received for one entire sum of two hundred and fifty dollars, two tickets headed "Vanderbilt's line for California, *via* Nicaragua;" one ticket being for the Atlantic and one for the Pacific steamer, with a third ticket for the transit route. Also that defendant owned the steamers on the Atlantic side and was part owner of those on the Pacific.

Plaintiff left New York, March 5, 1859, in the appointed steamer, and arrived at Greytown in due season, March 14. There he was detained eleven days, but no evidence was given as to the cause of the detention. Two days after leaving Greytown, in crossing the Isthmus, he was taken sick with bowel complaint. He arrived at San Juan del Sur, on April 4. The boats in which the passengers were carried on the Isthmus, were repeatedly delayed, and a number of the passengers were sick. On arrival at San Juan del Sur, on the Pacific coast, plaintiff and the other passengers having tickets for the steamer North America, were required to wait there fifteen days in expectation of her arrival. Meanwhile, however, the North America had been lost at sea, about February 27, a fact unknown to the defendant, till about May 20.

The plaintiff, having unsuccessfully endeavored to procure a passage to San Francisco upon another vessel, returned to New York, still sick with fever; and commenced this action.

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A similar action by one Williams, against the same defendant, was tried at the same time.

The charge and requests to charge are sufficiently stated in the opinion.

The jury found for plaintiff one thousand dollars damages.

The supreme court, on appeal from an order denying defendant's motion on a case, for a new trial, held that the facts above stated imported a contract by defendant as a common carrier to carry plaintiff over the entire route, and was sufficient to go to the jury on that question; that it was his duty to provide a new vessel on the loss of the one designated in the contract and that the question of negligence was fairly submitted to the jury. Reported in 29 *Barb.* 491. Defendant appealed.

Charles A. Rapallo, for defendant, appellant, insisted that the contract was a special one limited to the vessel named. *Bonesteel v. Vanderbilt*, 21 *Barb.* 26. And the vessel having been lost when the contract was made the contract was made under a mistake of facts; *Ib.* *Briggs v. Vanderbilt*, 19 *Id.* 232. 3 *Johns.* 335; 4 *Campl.* 241; and that there was no evidence justifying damages for loss of health.

George Rathbun, as to duty to provide another vessel, cited, *Oakley v. Morton*, 11 *N. Y.* 25; *Inman v. Fire Ins. Co.*, 12 *Wend.* 452; *Harmony v. Bingham*, 12 *N. Y.* 99; *Bonesteel v. Vanderbilt*, 21 *Barb.* 26; *Pars. on Cont.* 184, 185; *White v. Warn*, 26 *Me.* 368; *Chapman v. Dalton*, 1 *Plow.* 284.

BY THE COURT.—BALCOM J.—The facts in this case are substantially like those in *Williams v. Vanderbilt*, 23 *N. Y.* 217, decided at this term of the court. The requests that the defendant's counsel made upon the judge, to charge the jury, do not make this case materially different from that brought by *Williams*, (above). Those he first made were: 1. That the testimony did not establish that the defendant was a common carrier from New York to San Francisco. 2. That the testimony did not establish any violation or neglect of duty on the part of the defendant. 3. That, upon the whole evidence in

the cause, the plaintiff was not entitled to recover. I am of the opinion the judge properly refused to charge either of these requests. There was sufficient evidence to make it his duty to submit the questions to the jury. 1. Whether the defendant was a common carrier of passengers from New York to San Francisco, 17 N. Y. 310. 2. Whether he was guilty of neglect or violation of duty to the plaintiff. 3. Whether, upon the whole evidence in the cause, the plaintiff was entitled to recover.

The judge rightfully refused to charge, . . . "that there was no evidence of the value of the plaintiff's time, and that the plaintiff was not entitled to recover for loss of time." The fact that there was no evidence of the value of the plaintiff's time did not preclude the jury from giving such compensation therefor as they deemed was reasonable. There was sufficient evidence to make it the duty of the jury to determine whether the plaintiff's sickness and loss of time were occasioned by the fault of the defendant, his agents or servants. And if the same were so occasioned, the plaintiff was certainly entitled to compensation therefor.

The other requests of the defendant's counsel were as follows, to wit: "The plaintiff is not entitled to recover his expenses incurred after receiving notice of the loss of the *North America*, and before commencing his journey home. The plaintiff is not entitled to recover the expenses of his return. If the jury find that the damages sustained by the plaintiff were occasioned by the loss of the *North America*, and that loss occurred before the plaintiff engaged his passage, but both plaintiff and defendant were ignorant of the loss, and dealt in good faith, then the dealing was based upon a mistake of fact, and the plaintiff is not entitled to recover in this action. When a person engaged in the business of transportation, advertises or holds out to the public that he will carry passengers generally, between two points, or points or places, without disclosing the means of conveyance to be used for such carriage, he is bound, in case of the loss or destruction of the conveyance to which the passenger is assigned, to supply another conveyance, if one can be supplied by reasonable diligence. But where the carrier holds out to the public, and notifies the passenger applying for pas-

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sage that he will carry the passenger by a particular conveyance, which is described and designated, the undertaking of the carrier is restricted to that conveyance, and in case of the loss or detention of that conveyance, without negligence and by the act of God, the carrier is discharged from all liability, further than to return the passage money." These requests were properly refused for the reasons assigned in my opinion in *Williams v. Vanderbilt*, *supra*, and the authorities therein cited. The judgment in this action should therefore be affirmed, with costs.

All the judges concurred, except ROSEKRANS and MARVIN, JJ., who did not vote.

Judgment affirmed, with costs.

WARFIELD v. CRANE.

December, 1868.

Where land, of which one undivided share is held in fee, and the other undivided share in tenancies for life and in remainder, is conveyed in parcels, by successive deeds, to different persons, the later conveyances expressly referring to the former and being subject thereto, the court, on making partition between the owners of the undivided interests, should give effect to the earliest conveyances in preference to the later.

The principle of partition is the same where a sale is necessary, as where actual partition is made; and the rights of the parties in the proceeds of sale are the same as in the lands themselves.

Where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained; and a judgment directing that the value of the parcels assigned on account of such equities, shall be estimated at the same rate as the other parcels bring upon a sale, is error, unless it appears by the record that it did not work injustice.

Thomas W. Warfield brought an action against Carso Crane and wife and others, for a partition of lands.

Alexander W. Warfield, the common ancestor, devised a tract of about one hundred and ninety-two acres to his two sons,

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Alexander and Arnold; one undivided half to Alexander in fee, the other undivided half to Arnold for life, remainder to his heirs. Alexander conveyed his share to Arnold, and after Alexander's death, the deed being lost, his heirs also conveyed it to Arnold.

Arnold, then owning one-half in fee, and a life estate in the other half (the remainder being vested in his heirs), conveyed fifty acres by specific bounds, in fee to one Fitzgerald. Subsequently, Arnold conveyed the residue of the whole tract, excepting so much as was conveyed to Fitzgerald, to James Warfield. Warfield, by successive conveyances to different persons, granted separate parcels of the tract, the last conveyance being to the defendant Carso Crane.

In the present suit, the claimants, under the earliest grants of Arnold, insisted that they were entitled to hold in fee, and that the last conveyance should be deemed to convey the life estate only.

The supreme court confirmed the title of the earlier grantees, and directed a sale, and a division of the proceeds of the land last conveyed; and directed that the portions not sold be estimated according to the price brought by those sold. Carso Crane, the last grantee, appealed.

E. G. Lapham, for defendant, appellant.

T. R. Strong, for plaintiff, respondent.

BY THE COURT.—WOODRUFF, J.—The correctness of the principle upon which the court below proceeded, in directing a partition of the premises in question herein, so as to give full effect to the earliest conveyances, in preference or priority to the conveyance to the appellant Crane, can not, I think, be denied.

By those prior conveyances, Arnold Warfield, and his son James Warfield, were bound, and whoever took conveyances from them thereafter, were (in respect of one-half of the lands held in fee) precluded from objecting, that those earlier deeds should not, as between the grantees therein and themselves, operate according to their purport.

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The defendant Carso Crane, who alone appeals, holds in distinct subordination to the rights of the earlier grantees. He took with actual knowledge;—first, of the prior conveyances; second, that as to one-half of the lands conveyed to him he might acquire only an estate for the life of Arnold Warfield; and, third, that his title was subject to the proper legal and equitable operation of the conveyances by his grantors, of the lands previously conveyed by them. Knowledge of all the facts out of which legal or equitable rights arise in favor of another is knowledge of those rights.

If, therefore, the appellant had no interest in the premises except as owner of the fee in one-half, which was originally vested in Arnold Warfield, so far as that was conveyed to him, he would have no claim against those prior grantees; as to him, as such owner, they are entitled to have the other one-half assigned to the remainder-men out of the lands last conveyed, *i. e.* out of lands conveyed to him. And if this was his only interest, the judgment should clearly be affirmed, for the other defendants, who are remainder-men, have not appealed. They do not complain that in the partition or in the sale and distribution ordered by the judgment they do not receive their just share of the property.

But the appellant Crane holds a two-fold relation to the subject, first, as grantee of the fee in a portion of the property; second, as grantee of one-tenth of the remainder in one-half of the whole property, by the conveyance from James Arnold, one of the remainder-men by the original devise.

Now, although he is bound to submit to have the remainder assigned to the lands which were conveyed to him, he is entitled in fee to the residue after such remainder has been so assigned; *i. e.* one-half of the whole property is first to be assigned out of the lands conveyed to him, and whatever remains of those lands belongs to him as the owner in fee.

This is in exact conformity with the decision made on the trial, and is the rule by which the rights of the appellants must be settled. That decision, contemplating an actual partition of the lands, was therefore correct.

If an actual partition was made it would be governed by the actual value of the whole premises (exclusive of the buildings

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and improvements erected by the several grantees of Arnold and James Warfield).

But the court below, in settling the final judgment or decree, have directed, instead of such actual partition, a sale.

Upon what proofs or upon what inquiry into the practicability of making actual partition the court was induced to order the sale, does not appear by the record. I do not, however, understand the appellants as raising any question of the propriety of the judgment on that ground. No doubt the court had, by some proceeding not embodied in the record, ascertained that an actual partition was impracticable, and a sale was, therefore, necessary.

But, where, on bill for a partition, a sale is found necessary, the principle or rule of partition is not changed. The rights of the parties in the proceeds of sale are precisely the same as in the lands themselves; and their several interests are determined by the actual value of the whole premises. Reserving, to certain of the parties, portions by reason of their prior equities, does not affect the right of the others in the adjustment of their respective interests, to have the actual value of the reserved portions of the whole property brought into view.

The decree directs, that in determining the respective interests of the appellant, and the remainder-men, in the proceeds of the lands directed to be sold, the lands held by the prior grantees, and which were reserved to them in fee, should be estimated at the same rate or value as shall be produced by the lands which are sold. There is nothing in the record before us which shows that this is right, and no rule of law prescribes such a mode of declaring or fixing the value of the lands so reserved or assigned to the prior grantees.

Those lands may be worth more per acre than the lands held by the appellant; they may be worth less; and the value of the two may be equal. It can not be said as matter of law, that the appellant was bound to submit to a naked assumption that they were worth neither more nor less, or that by law they must be assumed to be of equal value.

Such an assumption was therefore erroneous, there being nothing in the record which shows that it did not work injus-

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tice to the appellant ; he has a right to complain thereof, as he does, on this appeal.

To illustrate, suppose that the actual value of the ninety-two acres reserved to the prior grantees, and exempted from the sale (exclusive of buildings, &c., before referred to, if any), is but ten dollars per acre, and that the one hundred acres conveyed to the appellant, and ordered to be sold, produce twenty-five dollars per acre. Then, obviously, the appellant would suffer wrong and loss by a distribution of the proceeds of the sale, in the manner directed by the decree.

Thus, the actual value of the whole premises, on this supposition is, 92 acres at \$10 per acre, \$920
100 acres at \$25 per acre, 2,500

Total, \$3,420

Distributing this according to the equitable rights of the parties, upon the principle above stated, would give to the appellant—

First, as the owner of the $\frac{1}{10}$ of $\frac{1}{2}$ in remainder, . . . \$171
Second, as owner in fee, of so much of the land conveyed to him, and now sold, as was not required, to satisfy the claims in remainder, to one-half of the whole, \$2,500 less \$1,710, 790

To be distributed to the appellant, \$961
Whereas, by the terms of the decree, the whole of the lands are to be estimated at \$25 per acre, \$4,800, of which he would receive, as remainder-man, $\frac{1}{10}$ of $\frac{1}{2}$, \$1200, \$240
And as owner in fee \$2,500, less \$2,400, 100

Total, \$340

It is true, that if this discrepancy in value was reversed, it would appear that the decree will operate more favorably to him than it ought. But upon any facts appearing in the case, this direction in the decree does not appear to have been warranted, and the appellant is here complaining of it as an error. We can not say that it has wrought no injustice to him.

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This error does not appear in the finding and decision of the court on the trial, but in the decree; in that respect, the decree does not follow the principle of the decision.

As already stated, the distribution of the proceeds of sale should be according to the *actual value* of the whole premises.

It is very desirable, that, in order to save expense to all parties, the decree should be corrected, without a new trial; there would seem to be no practical benefit to either in disturbing the findings or decision made on the trial of the cause. The judgment must, however, upon the record before us, be reversed; and the court below may, I think, proceed to a proper judgment, upon the original findings and decision, in conformity with these views.

Upon the other questions raised on the appeal, I concur in the opinion that no error was committed.

A majority of the judges concurred.

Judgment reversed.

WARNER v. BLAKEMAN.

December, 1863.

Modifying 36 Barb. 501.

A regular foreclosure, by advertisement, of a wholly void mortgage,—*e. g.*, a mortgage that has been paid and satisfied,—does not cut off the lien of judgment creditors, except, perhaps, to a *bona fide* purchaser of the land under the foreclosure, without notice; and such judgment creditors are not restricted to proceedings by execution in disregard of the foreclosure, but may proceed by a creditor's suit to reach the purchase money due from the *bona fide* purchaser to the mortgage creditor who made the fraudulent sale.

A creditor, with judgment and execution unsatisfied, filing a bill to set aside a fraudulent conveyance or assignment, may follow the property which was the subject of the fraud into the hands of any person but a *bona fide* purchaser; and if it has been transferred to a *bona fide* purchaser, &c., he may have a decree for the proceeds against the party who was privy to and profited by the fraud.

If such party has sold the property at an advanced price, he may be held liable for the increased value; but he is not liable for rents and profits.

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Hiram W. Warner and John P. Loop brought this action in the supreme court, as judgment creditors of Robert Turner, against Eben Blakeman and others, to set aside two mortgages on land, and the foreclosure of one of them, and subsequent conveyances of the property, on the ground that the two mortgages had been paid, and that the foreclosure was fraudulent as against the plaintiffs.

On March 10, 1853, plaintiffs recovered a judgment against Robert Turner, who then owned the land in Madison county, which is the subject of controversy in this action, and by docketing of the judgment in that county, acquired a lien thereupon.

The premises were then subject to two mortgages—one given by the said Turner and another, to the defendant Blakeman, to secure the payment of one thousand two hundred dollars cash lent; the other, given by the said Turner to Hiram Whedon, conditioned on its face for the payment of three thousand dollars, but in fact given to secure an existing indebtedness to a small amount, and contemplated future advances, and also to indemnify Whedon against certain indorsements, and contemplated future indorsements for the benefit of Turner.

On April 13, 1853, at or before which time Whedon had actual notice of plaintiff's judgment, the balance due from Turner to Whedon was one thousand seven hundred and eighty-two dollars twenty-eight cents, and Whedon's indorsement, to the amount of six hundred dollars, was outstanding.

Transactions were had between the parties on and prior to Feb. 17th, 1854, the result of which was, that on that day, Whedon gave up the three thousand dollar mortgage, consenting to rely thereafter solely upon the personal security of Turner for any balance remaining due to him; but, instead of delivering that mortgage to Turner, or acknowledging satisfaction thereof (the same not having, to that time, been recorded,) he executed a formal assignment thereof to the defendant Blakeman without any consideration, Blakeman paying no consideration therefor, none of the debts or obligations for which it had been held as security being transferred to Blakeman, and the latter neither paying nor agreeing to pay the same, nor any of them.

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On the same day and prior thereto, Turner made arrangements, by transfers of property and otherwise, in pursuance of which the one thousand two hundred dollar mortgage was paid in full, and in money received from Turner, or upon his order. And on Feb. 26, the said Turner and Blakeman had a settlement of their various transactions, in which a balance was found due to Blakeman, after payment of said one thousand two hundred dollar mortgage, of one thousand one hundred and twenty dollars eleven cents, which they then agreed should be secured only by a distinct and separate security, which was then given to Blakeman by Turner, and Blakeman delivered to Turner both mortgages, as paid and satisfied.

About nine months afterward, a negotiation was had between Blakeman and Turner, resulting in the purchase of the premises by the former, for the price of two thousand dollars, and the latter accordingly executed to Blakeman a deed in which the premises were declared to be subject to both of the before-named mortgages, and at the same time restored the two mortgages to Blakeman's possession, retaining nevertheless, the bond which the one thousand two hundred dollar mortgage was originally given to secure; and in December next ensuing, Blakeman went through the form of a foreclosure of the three thousand dollar mortgage, by advertisement pursuant to the statute, declaring in his notice of sale that two thousand six hundred and seventy-five dollars twenty-six cents, was due on the said mortgage, and transmitted that notice, by mail, to the plaintiff's herein. At the sale made pursuant to the advertisement, Blakeman bid off the premises himself, at the price of eight hundred dollars, and entered into possession.

The object and purpose of this form of foreclosure and sale was to cut off and extinguish the lien of the plaintiff's judgment upon the premises.

The value of the premises at the time of the sale was one thousand two hundred dollars; but afterward, and before the commencement of this action, Blakeman sold part of the said premises to *bona fide* purchasers, receiving money in part payment, and a bond and mortgage on the premises sold, to secure the other part of the purchase money, and had contracted to sell the other part of the premises, but the contract had not

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been carried into execution by conveyance and full payment. The aggregate price at which he sold exceeded the value at the time of the attempted foreclosure.

The supreme court, on a former hearing were of opinion that, although the three thousand dollar mortgage was satisfied, and its foreclosure was a fraud, the necessity to apply to equity to set it aside showed that the foreclosure sale was valid until set aside; and that a purchaser in good faith must be protected; that Blakeman's title was good as to the mortgagor who assented to the foreclosure; and that *Cameron v. Erwin*, 5 Hill, 272, could not apply where the mortgagor looked on without objection on a sale to a *bona fide* purchaser. That as to the one thousand two hundred dollar mortgage, whether it be regarded as a lien or as extinguished by the purchase, plaintiffs must be allowed the amount unless it had been paid. As the court were of opinion that the findings did not show whether the latter mortgage had been paid or not, they reversed the judgment of the referee who had decided that the purchaser took no better title than Blakeman, and sent back the cause for further examination on a new trial. Reported in 36 Barb. 501.

On the second trial the above facts were found; and the court gave judgment for plaintiff on the referee's report. Defendants appealed.

———, for defendants appellants,

N. Foote, attorney for plaintiffs, respondents.

BY THE COURT.—WOODRUFF, J. [After stating the above facts.]—Upon these facts there are two principal questions.—First, is the lien of the plaintiffs' judgment extinguished? and, second, if not, to what relief, if any, are they entitled in this action?

The transaction in question was a fraud upon the plaintiffs. The facts constitute fraud, and no less so because the referee in his findings has not employed the word "fraud" or "fraudulently," in order to describe or characterize them.

A mortgage that never was a security in the hands of the

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defendant, Blakeman, as against the plaintiffs, for any thing; which had been given up by Whedon, the only party in whose hands it was a security, after it had to his satisfaction answered the purposes for which it was given; which had again been given up by Blakeman himself, as paid and satisfied, to the mortgagor, is set up nine months afterward for the fraudulent purpose of cutting off the plaintiffs' lien upon the mortgaged premises. Not only so, but, manifestly in order to deceive the plaintiffs, it is falsely alleged in the notice of sale that there is due thereon nearly three thousand dollars, a sum greater than the value of the premises; and this, in order that Blakeman may purchase the premises, divested of the plaintiffs' lien, for which purchase he negotiated before the foreclosure was commenced.

Blakeman, Whedon and Turner, appear to have regarded this mortgage as a formal paper that could be handed from hand to hand, and, however often satisfied by the accomplishment of all the purposes for which it was delivered, to have new efficacy at each successive delivery as a continuance of its original lien, no matter what intermediate rights had accrued to others. And, after it had been given up to the mortgagor as paid and satisfied, and had so remained for nine months, they conceive the idea that it may be used, not as a security for a new debt, but for the mere purpose of the false representation that it is a subsisting, valid instrument, by means whereof the plaintiffs, deceived into submission to the apparent lien, may be deprived of their security.

It would not be creditable to the administration of justice if such a scheme could be successful; and it is clear, I think, that the rules of law and principles of equity are not ineffectual for its prevention.

Nor do I think any extended discussion of the subject necessary. It is the just and proper pride of our matured system of equity jurisprudence that fraud vitiates every transaction; and however, men may surround it with forms, solemn instruments, proceedings conforming to all the details required in the laws, or even by the formal judgment of courts, a court of equity will disregard them all, if necessary, that justice and equity may prevail.

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No uncertain or difficult questions of equity are, however, involved in this case. The mortgage in the hands of Blakeman, when he attempted to foreclose it, was mere waste paper. It had long been *functus officii*. The power of sale contained therein was at an end.

Unless, then, the form of a foreclosure, which Blakeman set on foot for the fraudulent purpose stated, gave him some new rights, the mortgage, and what he did under it, remain as to him but waste paper still.

What says the statute? Simply and only that a sale duly advertised and conducted, made to a purchaser in good faith, shall be equivalent to a sale under a decree of foreclosure in equity. *L.* 1844, ch. 346, § 4; 3 *R. S.* 5th ed. 861, § 8.

I have no occasion, perhaps, to say, that, upon the facts found in this case, no court of equity would hesitate to open a decree and set aside a purchase by a complainant. Here there is no decree to be opened; the plaintiffs' only resource is an action. There is no occasion to consider this because the statute declaring the effect of the advertisement and sale to Blakeman, gives no ground of claim to him, that he acquired any rights thereby. He has no color of pretense to be a *bona fide* purchaser.

The case of *Cameron v. Irwin*, 5 *Hill*, 272 justifies a doubt whether, under circumstances such as these, the power of sale having been extinguished by payment of the mortgage, even a *bona fide* purchaser would have acquired title. But the defendant, Blakeman, is no such purchaser. Indeed, I greatly doubt whether the holder of the mortgage, himself, directing the foreclosure for his own benefit, can ever become the purchaser so as to preclude inquiry into any question of antecedent fraud, so long as the property remains in his hands. But here, every step taken by Blakeman is infected by the false and fraudulent endeavor to cut off the plaintiffs' lien by artifice and misrepresentation, using the forms of law to conceal the truth and effect the object.

This apparently harsh language is, I think, not an exaggerated statement of the true aspect of the case in a court of equity. It may be, that Blakeman and Turner were blinded by interest or misled by the want of correct information, as to

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the effect of their acts, and, in a sense, they may have honestly supposed that it was not wrong to try to cut off the plaintiffs' judgment without paying it; but the transaction must be tested by its own merits or demerits, as the case may be.

My conclusion is, that, even without invoking those principles of equity which, were the language of the statute less explicit, would forbid the acquisition of title by Blakeman to the prejudice of the plaintiffs by such means, the statute gives no effect to the foreclosure, whatever, in favor of the fraudulent party, and that, as to Blakeman, the lien of the plaintiffs' judgment is, in equity, wholly unimpaired.

2. To what relief, if any, were the plaintiffs entitled in this action?

It is suggested, that, if the foreclosure and purchase by Blakeman are not effectual to cut off the lien of the plaintiffs' judgment, there was no foundation for this action, because the plaintiffs might proceed to sell by execution, and collect their judgment out of the real estate.

To this, there are two answers, either of which seems to me sufficient,—first, the proceedings for the foreclosure were regular; there is nothing on the face of the mortgage or of the proceedings to indicate that the title acquired by Blakeman was not entirely free of the plaintiffs' lien. It was the clear right of the plaintiffs to file their bill to remove this apparent legal impediment, and practically fatal hindrance, to the collection of their judgment. The practice of the court to entertain such bills for the benefit of judgment creditors to set aside fraudulent conveyances or assignments, petitions, mortgages and collusive judgments, is familiar to the courts and to counsel. Second, it is not clear, that those who subsequently purchased from Blakeman in good faith, without notice of any fraud, are not to be regarded as within the equity of the statute which makes the title of a *bona fide* purchaser at the sale equivalent to that acquired under a decree. That view of these rights was taken in the court below, and is not inconsistent with the grounds upon which it is denied that Blakeman acquired any title which can avail him against these plaintiffs, and, notwithstanding the doubt expressed in *Cameron v. Irwin, ubi supra*, whether even a *bona fide* purchaser would acquire

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title, there was still ground for invoking the jurisdiction of a court of equity as to those purchasers, to the end, that, if they were regarded as entitled to protection as *bona fide* purchasers, the unpaid purchase-money might be held to stand subject to the plaintiffs' lien in the place of the land they had so purchased.

The question then recurs, to what relief are the plaintiffs entitled? The answer has been, I think, correctly given in the supreme court. It is, in effect, that, as to Blakeman, they are entitled to subject to their lien all the proceeds of the sale of the lands upon which their judgment was a lien. This does to him no wrong, and it only gives to the plaintiffs their equitable right. It takes from Blakeman the fruits of his fraud, and it gives to the plaintiffs that which, but for the fraud, they could obtain by enforcing their lien. In short, the defendant, by device held fraudulent as to the plaintiffs, has converted into money, bonds and mortgages, and an executory contract of sale, the subject-matter in contest; and, in equity, that into which the land has been by such means converted, stands, in the hands of the fraudulent party, in the place of the land itself.

This principle, too, is familiar, and is acted upon daily in administering equitable relief to judgment creditors, impeaching fraudulent assignments and transfers of real and personal estate alike.

No right, legal or equitable, of the purchasers is affected by subjecting the purchase-money to the plaintiffs' claims, for in the destination of that money they have no interest, and there is, therefore, on the merits, no equitable ground whatever for their appeal; and Blakeman can not complain that the court below gave efficacy to his own conveyances and contracts with the other defendants, suffering them to operate in their favor as he intended, and still insists, they should.

The very able and ingenious argument submitted on behalf of the appellants rightly states, that a judgment creditor has simply a lien on the land, which can ripen into title only by a sale and conveyance. But the case relied upon, *Collumb v. Read*, 24 N. Y. 505, 515, by no means shows, that a court of equity will not arrest the proceeds, where the fraudulent con-

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veyance has been so far effectual, as, in favor of a *bona fide* purchaser, to withdraw the land itself from the operation of the lien.

The legitimate result of the appellants' argument is this: "The judgment creditors have a lien on the land; if, by a fraudulent device through the forms of law, I can clothe *bona fide* purchasers with a title, I can hold the proceeds or fruits of the fraud, and set the creditors at defiance." I think the rights of creditors can not be defeated by such means, and that the power and jurisdiction of courts of equity are efficient to prevent it.

It is true, that, ordinarily, the proper and the adequate relief is to declare the fraudulent conveyance void. This is all that is necessary for the plaintiffs' protection or redress. It does not follow, that, where the intervening right of a *bona fide* purchaser renders that decree inappropriate, the plaintiffs are remediless, and the defendants are to profit by their own wrong.

The rule, where judgment creditors acquire a lien upon real estate, and file a bill to reach it, is clearly and comprehensively stated in *Cook v. Smith*, 3 *Sandf. Ch.* 333, 338: "A creditor who, by his judgment in respect of real estate, his execution issued as to movables, and his execution returned as to things in action, is entitled to file a bill to set aside a fraudulent conveyance, sale or assignment, may follow the proceeds of the property transferred, into the hands of any number of intermediate assignees, and until the property or its proceeds lodge in the hands of a *bona fide* creditor who has received it and applied it upon his debt, or of a *bona fide* purchaser without notice of the fraud."

To the objection that a receiver should not have been appointed, and Blakeman directed to convey to him the lands not yet conveyed to the purchasers, it is, I think, sufficient to say, that the power of the court is ample, where the appointment of a receiver is necessary in order to carry into execution and enforcement the equitable rights established by the decree. No doubt, that, after the decree in this case had declared the plaintiffs to have a valid subsisting lien upon the land by virtue of their judgment, unimpaired by the attempted foreclosure,

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but nevertheless subject to the rights acquired by the subsequent purchaser by his contract with Blakeman,—the plaintiffs might have issued execution, and sold that portion of the land subject to such contract; but, the court having jurisdiction of the whole subject of the relief, and a receiver being eminently proper for the collection of the bonds and mortgages owing by the purchasers of other portions of the land already conveyed by Blakeman, there was great reason for acting distinctly in affirmance of the contract of sale, and requiring the purchaser who had not received a deed to pay to the receiver; and yet this could not be done in justice to such purchaser, without assuring to him a conveyance when his payments were completed, and this required that the court should require Blakeman to convey to the receiver.

It is an error to say that the plaintiffs were, in case of such a contract, shut up to the exercise of their purely legal rights, to wit, a sale and execution, subject to the contract; they were, in this respect, in the same condition as a judgment creditor, whose judgment is recovered after a *bona fide* contract of sale has been made—both hold judgment liens, subject to the contract. Of such a creditor, DENIO, J., says, in *Moyer v. Hinman*, in this court, 13 N. Y. 180, 184: “The creditor had, at *law*, the right to acquire the legal title to the land by means of a sheriff’s sale, and a purchase by himself; but *in equity*, his rights were limited to the future payments to be made by the plaintiff” (the purchaser).

These payments the plaintiffs here in a court of equity have secured, and this is the only mode in which the purchaser could be also properly protected, and the rights of the plaintiffs enforced if the purchaser should not perform his contract.

I do not find any thing in the decree appealed from, which requires Blakeman to pay over the rents and profits of the premises, or value of their use while in possession, though the argument for the appellant seems to assume that it is so adjudged. The decision in *Collumb v. Read*, 24 N. Y. 505, 515, would condemn such a requirement, since, notwithstanding the plaintiff’s lien, the judgment debtor might have enjoyed such rents until a sale or bill filed to reach them.

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But in regard to the increased value of the property since the attempted foreclosure the decree is right. If the property had been retained by Blakeman in his own hands, the decree would have declared that foreclosure void and inoperative as against the plaintiffs; and, in that case, their lien, always good as against Blakeman, would have attached to whatever enhanced value had accrued to the land, and that value would have been secured to the plaintiffs.

That is awarded to them down to the time of the respective sales by Blakeman, and no substantial reason can be given why Blakeman, and not the plaintiffs, is entitled to it.

I think the judgment must be affirmed.

All the judges concurred, except GROVER, J., who did not vote, and MILLER, J., absent.

Judgment affirmed, with costs.

WATSON v. GRAY.

December, 1868.

The employer of a building contractor, authorized the contractor to buy lumber, and give an order upon him (the employer), for the price, promising to pay, and charge it upon the contract. The contractor bought the lumber on the credit of the employer's name, and, after it was delivered upon the employer's premises, the bill for the lumber was presented to the employer, who then promised verbally to pay it. *Held*, that although the employer was not rendered liable by the purchase and delivery in his name, instead of in the contractor's name with an order on him for payment,—his subsequent promise to pay operated as a waiver of the order, and a ratification of the contractors' agency in the purchase.

James H. Watson and others sued Daniel H. Gray, in the city court of Brooklyn, for goods sold. It appeared that one Matthews had contracted with Gray to alter Gray's house, and applied to Gray for aid in obtaining the lumber necessary. Gray said to him "Go to any lumber yard and get the lumber and give them an order on me, and I will pay for it, and

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deduct it from the contract." Matthews, as it appeared, at least according to part of the testimony on the trial, instead of giving his order for lumber, which he consequently bought, bought the lumber from plaintiffs, on Gray's credit, and plaintiffs, trusting to that credit on Matthews' representations, delivered it on defendant's premises. At the time of delivering it, and after the deposit of the lumber on the premises, the bill therefor, made out against Gray, was presented to Gray, and he verbally promised to pay it.

The supreme court, on appeal, reversed a judgment for plaintiffs, which the city court gave. Plaintiffs appealed.

DWIGHT, J.—It was considered, in the opinion pronounced at the general term, that the motion for a nonsuit was properly denied for the reason that there was evidence tending to show that Matthews had authority to get lumber on the defendant's credit; but it was said that the subsequent evidence presented a different aspect of the case, viz.: that the direction, given by the defendant to Matthews, was to go to a lumber yard and buy the lumber for himself, giving an order on the defendant to pay for it. Assuming this to be the true aspect of the case, and that Matthews had, therefore, no authority to buy lumber on the defendant's credit, it was held, that the court below erred in refusing to charge in both respects, as requested by the defendant; and the judgment was reversed on that ground. I think the reversal was error. It can not be claimed that the evidence on the part of the defendant was conclusive, on the question of the authority given to Matthews. Whatever evidence there was in the case, at the time of the motion for a nonsuit, tending to show that Matthews had authority to buy on defendant's credit, remained in the case at the time of the request to charge, and though it had been contradicted by the defendant, it was plainly a question for the jury, which statement was a true one, and what Matthews' authority really was. It would, therefore, have been error for the court to charge in accordance with any request which assumed either of the aspects of the case to be the correct one.

But even if the evidence had been conclusive, that Mat-

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thews' only authority was to buy on his own credit, giving an order on the defendant in payment of his debt, yet if he did, in contravention or excess of his authority, or without any authority at all, buy for the defendant, and on his credit, it was possible for the defendant afterward to ratify such unauthorized act, and to bind himself, though he was not bound by the act of Matthews. And it seems to me that there was evidence in this case amply sufficient, if believed, to warrant the jury in finding such a ratification. In the first place, it appears, without dispute, that Matthews did buy the lumber on the credit of the defendant, and that the plaintiffs, trusting to that credit, delivered the lumber on the defendant's premises. We have then the testimony of the carman, who drew the lumber, that at the time of delivering it, he presented a bill of it to the defendant, made out in items, charged to the defendant "per Matthews," and that the defendant, after looking at the bill, the lumber itself being in sight, promised to pay it.

If such were the facts, the ratification of Matthews' act of agency was complete, and the liability of the defendant was fixed. The ratification was with full knowledge of all the facts. The defendant knew that Matthews had ordered the lumber; that he had ordered it on his, the defendant's, credit, and that it had been charged to him and delivered to him there, upon his premises. He had before him a bill of items of the purchase, and the lumber itself was present for his inspection. Matthews corroborated the carman as to the presentation of the bill to the defendant, and a salesman of the plaintiffs testified, that, a short time afterward, he again presented the same bill to the defendant, and he again promised to pay it. With this evidence in the case, which, though contradicted by the defendant, the jury had a right to believe, it would have been manifest error for the court to charge as requested, that, if the defendant was not liable for the lumber at the time of its delivery, there was nothing in what subsequently occurred to make him liable, and equally error to charge, that the defendant's acts and declarations were no waiver of his right to insist upon having an order from Matthews for the payment of the bill. I think the whole case was properly submitted to the jury, first, to say what Matthews' authority was, and, second,

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even if he had acted in contravention or excess of his authority, whether the defendant had not subsequently ratified his act, and made himself liable for the debt.

If these views were correct, the judgment and order of the general term should be reversed, and the judgment of the court below affirmed.

GROVER J.—The motion to dismiss the complaint was properly denied. Evidence had been given by the plaintiffs, tending to show that Matthews purchased the lumber of them in the name of and upon the credit of the defendant; that a bill was made of it against the defendant, and delivered by the plaintiffs to their cartman to present to the defendant at the time he delivered the lumber; that the cartman unloaded the lumber upon the sidewalk upon defendant's premises; that he then presented the bill to the defendant, who said, "Matty (Matthews) pay this;" to which the cartman replied, "He says you pay it," and was going to take back the bill, when the defendant said, "Never mind, I will see that Mr. Watson gets his money," and retained the bill. This was evidence proper to be submitted to the jury, for them to determine whether the defendant had not given to Matthews authority to purchase the lumber for him, upon his credit, or that, knowing he had so purchased of the plaintiff, of a ratification of such purchase.

Various exceptions were taken by the defendant's counsel to the charge of the judge. To understand these exceptions, it is necessary to consider them in reference to the evidence. From that, it appears that Matthews had made a contract with defendant to find the materials and do a job of carpenter work upon a building for defendant; that Matthews informed the defendant that he could not procure the lumber; that defendant gave him his address, and told him he could upon that buy lumber at any yard; to go and buy it, and draw an order on him for the price, and he would pay it, and apply the amount upon the contract. The court, among other things, charged the jury that if Matthews, under this authority, had drawn an order upon the defendant, for the price of the lumber purchased of plaintiff, and delivered the same to

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the plaintiff, and he presented it to defendant in a proper time, the plaintiff could have recovered of defendant in case he refused to accept and pay the order. To this part of the charge, the counsel for the defendant excepted. It would appear that this was wholly immaterial, inasmuch as no such order was ever drawn or presented; but it became material in consequence of the further charge in relation to a waiver of the order by defendant. The correctness of the former portion of the charge depends upon the construction of the authority given by defendant to Matthews. If by that, is to be understood that the defendant promised Matthews that if he bought lumber for himself, upon his own credit, and drew upon the defendant for his debt so contracted, he, the defendant, would pay the draft, the charge is erroneous. The defendant would not be liable upon his verbal promise to accept and pay, and the plaintiff could maintain no action against him upon his refusal. But if it constituted Matthews the agent of the defendant to buy lumber upon his credit, he undertaking to pay therefor, upon being presented with the order of Matthews, drawn upon him therefor, the charge was correct. It was the promise of the defendant to pay his own debt in this particular, and was binding upon the defendant. The facts and circumstances satisfy me that the latter was the true intention of the parties. Matthews told the defendant he could not procure the lumber. That was equivalent to saying that he had no means to pay, and no credit; whereupon the authority was given. If this authority did not enable Matthews to pledge the credit of the defendant for the lumber, it would not in any way facilitate his getting it, and would have been substantially useless. It was important for the defendant to have the order, as that would be a voucher, showing his payment to Matthews upon the contract.

The court charged that the defendant might waive the order. The defendant's counsel requested the court to charge that there was no evidence of such waiver. The court refused so to charge, and submitted to the jury as a question of fact, whether he had waived it. If the construction I have put upon the contract is correct, this part of the charge is so also. By that, this was the debt of the defendant, which he had

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order. The defendant's counsel requested the court to charge that there was no evidence of such waiver. The court refused so to charge, and submitted to the jury as a question of fact, whether he had waived it. If the construction I have put upon the contract is correct, this part of the charge is so also. By that, this was the debt of the defendant, which he had undertaken to pay upon being presented with the order, and it is obvious that he had the right to waive this, and his promise, upon being presented with the bill by the plaintiff's cartman, to see it paid, as testified by the cartman, was evidence of such waiver. The same reasoning furnishes an answer to the exceptions taken to the refusal of the judge to charge, that, unless the waiver of the order was made before the delivery of the lumber, it was void. This exception is based upon the idea that the lumber was purchased by Matthews upon his credit, and the debt therefore his, and that consequently any undertaking by the defendant to pay it is within the statute of frauds. In the view I take, the debt was the defendant's, and there was no liability against him (Matthews) except to give the order if requested, that the plaintiff could enforce.

The judgment of the supreme court should be reversed, and that of the city court of Brooklyn affirmed.

A majority of the judges concurred in this conclusion.

Judgment accordingly.

WEEDSPORT BANK v. PARK BANK.

September, 1866.

Affirming 2 Robt. 418.

An order on a bank to deliver negotiable securities to a person named or his order, with a direction to "give him the cash" if they have been collected, is equivalent to a draft payable to him or order; and authorizes the bank to pass the amount of such cash to his credit in deposit; and after having done so, and paid out the amount on his checks, the bank is not liable to the original owner.*

Plaintiffs sued to recover five thousand dollars, the proceeds of

* Compare *Ætna National Bank v. Fourth National Bank*, 46 N. Y. 82.

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two drafts on the Mercantile Bank, sent by plaintiffs to defendants to be collected by them and the amount to be used to pay two notes of Messrs. Cook, Everts & Co., which had been made payable at defendant's bank. These notes were provided for at maturity in some other way and the proceeds of the drafts which had been collected, were credited to plaintiffs by defendants. On May 2, 1861, plaintiffs, before they knew that the drafts had been collected, wrote to defendants as follows: "Please deliver to C. W. Kellogg, Esq., *or order* [here followed a designation of the notes and the drafts].

"If the two drafts are to our credit, then *deliver to Mr. Kellogg the cash*, and oblige," &c.

Mr. Kellogg was a depositor in the defendants' bank; and on May 4, 1861, defendants delivered to him the two notes mentioned in the letter, and also placed to his credit, in his deposit account, the proceeds of the two drafts. Kellogg drew against the credit, so that on or before May 7, 1861, he had drawn out the entire amount of the proceeds. On May 9, 1861, plaintiffs, by their cashier, wrote to defendants as follows: "I have drawn on you this day for the amount of the drafts, five thousand dollars, in favor of E. J. Blake, Esq., cashier, which please honor, unless you have already paid the amount on our order to C. W. Kellogg." On May 15, 1861, plaintiffs by their cashier again wrote to defendants saying, "Please inform me whether you have paid our draft for five thousand dollars to C. W. Kellogg, and oblige." On May 17, 1861, defendants answered, "We have given credit, 4th inst., to C. W. Kellogg, five thousand dollars, upon your order of course." On May 18, 1861, plaintiffs demanded the money notwithstanding it had been thus credited to and drawn against by Kellogg.

The superior court, at general term, held that the direction to give the cash to Kellogg was equivalent to a direction to pay it to him or his order, and that the transfer of the credit from plaintiff's account to that of Kellogg (who was to be regarded as the payee of a draft) was an extinguishment of the debt as between the parties to this action. Reported in 2 *Robt.* 418.

Plaintiffs appealed to this court.

B. W. Huntington, for plaintiffs, appellants, that defend-

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ants were bailees, cited *Graves v. Dudley*, 20 *N. Y.* 80; explaining *Commercial Bank of Albany v. Hughes*, 17 *Wend.* 94. That plaintiffs had a specific lien on the fund, *Tradesmens' Bank v. Merritt*, 1 *Paige*, 302; *Mechanics Bank v. Levy*, 3 *Id.* 606.

Barlow & Hyatt, for defendants, respondents, that the deposit of the money to Kellogg's credit was a payment to him, cited *Langley v. Warner*, 3 *N. Y.* 327.

BY THE COURT.—PORTER, J.—The complaint was properly dismissed. The Park Bank was guilty of no breach of duty; nor was it indebted to the plaintiff at the time the suit was commenced. The proceeds of the drafts were properly placed to the credit of the Weedsport Bank, and its direction to deliver the cash so credited, with the notes, to C. W. Kellogg or order, was sufficient evidence of his authority to receive payment from the defendant. It was so treated by the Park Bank, in passing the amount to his credit, and permitting him to draw it out on the faith of the order. That it was so intended by the Weedsport Bank, is evident from the letter of provisional revocation, which directs the defendant to hold the five thousand dollars to meet a latter draft in favor of Blake, "unless you have already paid the amount on our order to C. W. Kellogg." Even if the order were construed as calling for a technical delivery of the money, the defendant fully complied with its terms, by the successive payments in cash made to the order of Kellogg prior to the letter of revocation. But the instrument was in terms negotiable, and it was properly regarded by the court below as, in substance and effect, a draft for the payment to C. W. Kellogg, or order, of the sum of five thousand dollars, deposited in the Park Bank to the credit of the drawer. It was duly honored by passing the amount to the credit of the payee, with his assent, on the books of the bank.

The judgment should be affirmed.

JAMES C. SMITH, J., also delivered an opinion for affirmance.

MORGAN, J., dissented.

All the other judges concurred.

Judgment affirmed, with costs.

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WEHRKAMP v. WILLET.

September, 1864.

Under the married women's acts, and the provisions of the code of procedure in 1860, a wife might, as a party to an action, testify on her own behalf like any other party, irrespective of the interest of her husband, except that she could not be required to disclose communications made by one to the other.*

A witness can not be required to put a question to a person in court to elicit information—*e. g.*, as to the full name of a person of which she professes to be ignorant.

The affidavits on which a new trial was ordered, though served on the attorney of the adverse party and not contradicted, are not admissible on the trial to impeach testimony given there by such adverse party.

In impeaching a witness by the direct examination of *another* witness, the only proper inquiry is, as to the general moral character, and the public reputation of the former, as a truthful or untruthful person. It is not permissible to inquire into specified acts of immorality or misconduct.†

Ella Wehrkamp brought this action, in the New York common pleas, against James C. Willet, sheriff of the county of New York (for whom, on his death pending the action, James S., his executor, was substituted as defendant), to recover possession of personal property, consisting of carpets and pictures, which she alleged was unjustly detained from her. The defense was that the property belonged to William C. Wehrkamp, and had been taken in execution on a judgment obtained against him at the suit of one Martine. On the first trial plaintiff obtained a verdict, which was set aside, and a new trial granted, on the ground of newly discovered testimony.

* For the rule now adopted by statute, see 2 *L.* 1867, p. 2231, ch. 887. Consult also *Marsh v. Potter*, 30 *Barb.* 506; *Hooper v. Hooper*, 43 *Id.* 293; *Chamberlain v. People*, 23 *N. Y.* 85; *Card v. Card*, 39 *Id.* 317; *Maverick v. Eighth-avenue R. R. Co.*, 36 *Id.* 378; and see *Hicks v. Bradner*, vol. 2, p. 362, of this series.

The rule of exclusion only applies in case of *lawful* marriage. *Dennis v. Crittenden*, 42 *N. Y.* 542. Consult also *Southwick v. Southwick*, 49 *N. Y.* 510; affirming 9 *Abb. Pr. N. S.* 109.

† Otherwise of inquiries addressed to the witness assailed. *Shepard v. Parker*, 36 *N. Y.* 517, and cases there cited; *Brandon v. People*, 42 *Id.* 265; *Real v. People*, *Id.* 270.

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(The motion is reported in 1 *Daly*, 4.) On the second trial plaintiff offered herself as a witness, and was objected to by defendant on the ground that the action being under the sheriff's claim on the husband, it was substantially against him, and she could not be examined as a witness, because her husband was so far interested in the case. The objection being overruled, defendant excepted.

Other details sufficiently appear in the opinion of WRIGHT, J. The testimony on the part of plaintiff was principally directed to showing how she had become possessed of the property in question, and, on the part of defendant, to discrediting the testimony of the plaintiff, by showing that she was a woman of bad character.

A verdict was rendered for plaintiff for six hundred and seventy dollars, and the judgment entered thereon was affirmed by the court at general term; and defendant appealed.

A. R. Dyett, for defendant, appellant.

C. Bainbridge Smith, for plaintiff, respondent.

BY THE COURT.—WRIGHT, J.—The plaintiff was sworn as a witness in her own behalf; the defendant objecting to her examination, as the case states, on the ground that the action being under the sheriff's claim against her husband, it was substantially against him, and she could not be examined because her husband was so far interested in the case. The point of the objection is not clear, but if it has any meaning it is this, that the sheriff having taken and sold property under an execution against the plaintiff's husband, an action to test the title to such property is one substantially against him, and in which he is interested, and the law forbids husband and wife to testify either for or against each other. Regarding this as the substance of the objection there is no force in it.

The rule of the common law did not prohibit husband and wife from testifying in a civil action, unless one or the other, or both, were parties, or directly interested in the subject of the action. Here the husband was not a party, nor had he any such interest as would have disqualified the wife by strict com-

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mon law rules. The action was in no proper sense against him. He made no claim to the property taken and sold by the defendant, and had no interest in the litigation, unless, indeed, to have his debts paid from property to which he laid no claim. There was no conflict of interest between husband and wife; the latter claiming the property as her own, and the former not disputing or gainsaying her rights to it.

But had the husband been a party to the action, having any interest in the result, the plaintiff's competency would not have been affected.

The code provides that a party to an action, &c., "may be examined as a witness in his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination as any other witnesses," except "that neither husband nor wife shall be required to disclose any communication made by one to the other." *Code of Pro.* § 399, as amended in 1860; *L.* 1860, p. 787, ch. 459. The letter of the statute certainly extends to married persons when they are parties, not having conflicting interests; and the exception is a plain indication of the legislative intention to change or modify the common law rule as to the admissibility of husband and wife as witnesses. The reason of the latter rule for not admitting husband and wife as witnesses for each other was because of an identity of interest; nor were they admitted against each other, because this was deemed contrary to the legal policy of marriage. Husband and wife, says BLACKSTONE, "are not allowed to be evidence for or against each other, partly because it is impossible that their testimony should be indifferent, but principally because of the union of persons, and, therefore, if they were admitted to be witnesses for each other, they would contradict our maxim of law, no one shall be a witness in his own cause; and if against each other, they would contradict another maxim, no one is obliged to convict himself." 1 *Blacks. Com.* 443. "If they" (husband and wife), says Baron GILBERT, in his work on evidence, (page 552,) "swear for each other, they are not believed, because their interests are absolutely the same, and, therefore, they can give no more credit when they attest for each other, than when a man attests for himself, and it would be very hard if a wife

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should be allowed as evidence against her husband, when she can not attest for him. Such a law would occasion implacable quarrels and divisions, and destroy the very legal policy of marriage." But of late years, in this State, material and radical changes have been made in the law of husband and wife, and in the law of evidence, and the competency and admissibility of witnesses, undermining in a great degree the uses of, and practically abrogating the common law rule.

The wife has been admitted to separate rights of property, and to separate rights of action, even as against the husband himself. Interest in the event of the action is no longer a ground for excluding a witness, and the parties themselves may be witnesses in their own behalf, or witnesses in their own cause. Parties, with certain exceptions, are placed upon the same footing and subject to the same rules of examination as any other witnesses. There is no longer any reason for excluding husband and wife as witnesses for or against each other on the ground of interest; for as parties to an action they may be witnesses for themselves; and it was this ground of union of interest and privilege between husband and wife that mainly gave rise to the common law rule, excluding them from testifying for or against each other. Be this, however, as it may, the tendency and effect of legislation has been to abrogate the common law distinctions growing out of the marital relation in respect to the competency of witnesses; whether husband or wife are parties to, or interested in an action, they may be examined in the same manner, and subject to the same rules of examination, as any other witness, except that they shall not be required to disclose any confidential communication made to each other during marriage. If husband and wife are parties to an action, the statute in terms makes them competent witnesses in their own behalf, or in behalf of any other party, and subjects them to the same rules of examination as other witnesses, except protecting either from a disclosure of communications made by one to the other. The exception is strongly indicative of the legislative intention to render husband and wife, when parties, competent to testify as to all matters, other than communications made by the husband to the wife, or the wife to the husband.

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In the present case the action was brought by the wife for conversion of her separate property. As the plaintiff, she could testify on her own behalf, and had the controversy been between her husband and a third person in respect to the property, I entertain no doubt that she would have been a competent witness to show title in herself, and out of her husband, unless such title came through the latter.

The property consisted of Brussels carpeting and oil paintings, and the testimony of the plaintiff, if credited, clearly established her title to it. Indeed, all the evidence as to ownership was on the part of the plaintiff, and her own statement was materially corroborated by disinterested witnesses.

The defendant's proof was mainly directed to an impeachment of the plaintiff and to lessening the value of the paintings. It appeared from her testimony in connection with the other witnesses that she was a native of Denmark, and lived with her parents until she was fourteen years of age. She then went to live with her aunt in Sweden, who was wealthy, and she was with the latter some six or seven years. Her aunt left her sick at Hamburg, in Germany, and went to Paris, and after her recovery she came to this country. She brought with her one thousand dollars in gold, and nearly two thousand dollars worth of jewelry, given to her by her aunt, and also three paintings, "The King and the Queen of Denmark," "The Sacrifice" and "The Aurora." She was supported in the fact of having gold, costly jewelry and paintings when, in 1853, she embarked for this country, by a lady who knew her at Hamburg. On her arrival at New York she put up at the Hotel Constance, and the bookkeeper of the establishment testified to having seen in her possession some five hundred dollars or six hundred dollars in gold, and also much valuable jewelry. She was married in September, 1854, to W. Wehrkamp, who was a bookkeeper, and a person without means, and neither at the time of the marriage or since had been engaged in any business on his own account. Some three years after the marriage, the plaintiff, and her husband went to Europe. but were absent but a short time. Seven of the paintings taken by the sheriff were purchased by the plaintiff from an English artist after her marriage, with her own means, and five small pieces

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she painted herself. She kept an account in her own name in the Bleecker-street Savings Bank from March, 1855, to March, 1857, and while the account was running the teller testified that she spoke to him of having paintings and jewelry which she desired to sell. In 1856 and 1857 she purchased the carpets in question from Doughty & Brother, who only knew her in the transaction. A short credit was given, and she paid for them with her own money. Of this carpeting there were over five hundred yards, worth at least one dollar per yard. It is true that the plaintiff and Wehrkamp were living together as husband and wife when the property was seized, but beyond this there was not a fact or circumstance in the case tending to show ownership in him or to disprove the plaintiff's ownership. Upon this proof it would have been error to have granted the motion to dismiss the complaint on the ground argued, viz: that there was not sufficient evidence that the property in question was the separate property of Mrs. Wehrkamp to entitle her to recover.

Many of the defendant's exceptions occur in the cross-examination of the plaintiff. Several of them were palpably frivolous, requiring no notice, and were not insisted upon in the argument, nor are any, on which a point was made at bar, tenable. The fact to which our attention was directed arose in this way: The defendant's counsel had got the witness to say that she recollected that a Mr. Carpenter had obtained a judgment against her husband. The question was then put to her, "Do you recollect asking Mr. Carpenter to loan that money—the money for which the judgment was obtained and the property taken?" This was objected to and excluded. Two or three other questions of a similar character followed, varying only in phraseology, which were also excluded. She was then inquired of, "Did you at any time say to Mr. Carpenter, or in his presence, that the paintings and carpets belonged to you and your husband and they will pay the debt?" This was allowed and answered. There was no error here. The questions excluded assumed facts not proved. There was nothing in the case to show that the property was taken to satisfy a judgment obtained by Carpenter against Wehrkamp for borrowed money. Free from this objection, and when the inquiry

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was put in form to throw light upon the issue whether she was the owner of the property, it was allowed and answered. The defendant's counsel, however, was not satisfied, and persisted in the question, 1. "Did you tell Mr. Carpenter in November, 1857, that your husband was sick and wanted some money?" and, 2. "Do you recollect the fact of your husband borrowing money of Mr. Carpenter in November, 1857?" These were properly excluded. The fact of her husband borrowing money from Carpenter was wholly immaterial. At a subsequent stage of the trial the defendant's counsel returned to this course of irrelevant examination, but with no better success.

The plaintiff testified that she at one time loaned some of her money to a Mr. Jacobi, a friend of her husband, who was then in New York; she did not know his Christian name. The defendant's counsel then inquired, "Will you ask your husband, who is here in court, what Jacobi's first name was, and where he lived, so that I may ascertain who he is and where he lives?" The court, on objection, excluded the question, arresting the colloquy with the witness, and the defendant excepted. This was plainly right. It would have been the duty of the court in the orderly conduct of the trial, irrespective of any formal objection, to have arrested such a course of examination. It was manifestly trifling with the dignity and wasting the time of the court by impertinent and irrelevant inquiries; unprofessional conduct of counsel.

It seems that the action had been once tried and the plaintiff had obtained a verdict. A new trial was granted, as it was alleged by the defendant's counsel, on the ground of newly discovered evidence. The plaintiff stated, on her cross-examination, on the present trial that she did not know the ground on which the new trial was granted, and that she did not recollect of testifying on the first trial that she obtained credit from Doughty for one bill of carpeting, because she had money in the savings bank, but if she so testified she misunderstood the question. At the close of the defendant's case his counsel offered to read the affidavits on which the motion for the new trial was made, and in connection therewith, to prove that they were served on the plaintiff's attorney, and that no affidavits

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were read on her part to contradict them, with the view, as was stated, of showing, first, that the plaintiff swore falsely in stating that she was ignorant of the ground on which a new trial was granted, and second, that the new trial was moved for on the express ground that she had on the first trial sworn that she got credit from Doughty on one bill of carpeting, because she had money in the savings bank, when the newly discovered evidence showed that she had no money there; and to argue to the jury from thence, that her statement, that she knows nothing of all this, and that she did not testify on the former trial as alleged, or if she did, she misunderstood the question, was a mere pretense.

Of course, the affidavits used on the part of the defendant in a collateral proceeding, were excluded, and properly so. If it were at all material or important to contradict the statement of the witness that she did not know on what ground the new trial was granted, it could not be done in this way, nor was the testimony permissible to enable the counsel, as was averred upon it, to hinge an address to the jury against the witness' credibility. The probabilities are, that being a foreigner, having an imperfect knowledge of our language or of the form and course of legal proceedings, she testified truly that she was ignorant of the ground on which the motion for a new trial was granted; but whether so or not, or if at all material, her testimony in this respect could not be falsified by showing that the affidavits of the defendant on the motion, alleged a certain ground, and no affidavits were read on the part of the plaintiff in contradiction of them; nor if it had been important to show that on the first trial she testified that she obtained credit for the bill of carpeting, bought in May, 1857, because she had money in the savings bank, when in fact she had not, could it be shown by the affidavits of the defendants prepared for, and used on a collateral motion. The avowed purpose, however, of the offered testimony was not to show that the witness had testified untruly, as to her knowledge of the ground on which a new trial was obtained, or in respect to any material fact on the first trial, but to enable counsel to argue to the jury, that her statement that she knew not why the new trial was granted, or that she did not recollect of testifying on the former occa-

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sion, that she was credited for a bill of carpeting, in May, 1857, because she had money in the savings bank, or if she so testified she misunderstood the inquiry, was a mere pretense. This was certainly a novel attempt to get before the jury impertinent and irrelevant testimony on which to base an assault upon the witness' credibility.

The defendant offered no proof on the question of ownership of the property, but the main effort seems to have been to impeach the character and credit of the plaintiff. In this his counsel was indulged by the court in a wide latitude of examination, but apparently with indifferent success. None of her statements were shown to be untrue. Her reputation for truth, or her moral standing for eight years that she had resided in the city of New York, was not questioned. Two witnesses were produced who testified to having known her and her parents in Denmark; one of whom stated that, prior to 1850, she was a prostitute in Copenhagen, and the other that he had danced with her many years ago in her native place at public balls and masquerades; that her general character or reputation then was bad, and that from what he had heard and known of it in Copenhagen, he would not believe her under oath. The first of these witnesses was not interrogated as to her general moral character in her native place, or in Copenhagen, but was allowed, without objection, to testify generally to the fact that at some time before she came to this country she was a prostitute, and lived in a house of prostitution; although it appeared from his cross-examination that he testified from no personal knowledge, never having met or spoken to her but once in Copenhagen, and then by accident in the street. With respect to the other witness, after stating that he had danced with her at public balls and masquerades, the defendant's counsel propounded the question to him, "What was the character of the house in which the balls and masquerades were given?" This was objected to and excluded, and an exception taken. This was not error. The only proper inquiry on the direct examination of the witness was as to her general moral character and her public reputation as a truthful or untruthful woman. It was not permissible for the defendant to show specified acts of immorality or misconduct with the view of

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impeaching or discrediting her as a witness. The character of the houses at which she attended balls and masquerades, was utterly immaterial except in its bearing on her moral reputation and habits.

These are all the exceptions supposed on the argument to be entitled to any consideration. Indeed, none of them were strenuously urged, except that allowing the plaintiff to be examined as a witness on her own behalf.

The judgment of the common pleas should be affirmed.

A majority of the judges concurred.

MULLIN, J.—Had the verdict of the jury been for a much less sum than that for which it was rendered, I should feel much better satisfied that injustice had not been done to the defendant and those he represented. But the court below has not seen fit to disturb the verdict, and we can not if we would, interfere with it, notwithstanding it might be satisfied that it was for much more than the plaintiff was entitled to recover. If the ruling on the trial was correct, the judgment must stand, whatever errors may have been committed by the jury.

The first question presented for our consideration is, whether the plaintiff was a competent witness in her own behalf. The ground of objection to her is, that the defendant asserts title to the property in controversy through a judgment recovered against the plaintiff's husband, and, therefore, the husband is substantially a party, and the wife can not be examined as a witness against her husband.

At common law, neither the husband nor the wife could be examined as a witness for or against each other, and this rule of exclusion was adopted because it was considered to be against public policy to compel persons occupying the relation of husband and wife to disclose the acts and sayings of each other, or to subject either to the prejudice or passion which would naturally arise against the one who should give evidence injurious to the interests or feelings of the other.

To this rule of exclusion there was but one exception,—that either might be a witness against the other in regard to personal injury done or threatened, and that the wife was a com-

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petent witness against the husband on the trial of an indictment for a forcible marriage, or for a conspiracy or fraudulent marriage. 2 *Cow. & H. notes*, 1554. In all civil matters they were wholly incompetent to testify for or against each other. *Id.* 1554.

The Code has changed the common law rules of evidence in many very important particulars, among others by making the wife a competent witness against her husband in actions in respect to her separate property. By the act for the more effectual protection of married women, passed April 7, 1848, L. 1848, ch. 200, p. 307, a married woman was permitted to take by gift, devise or bequest from any person other than her husband, and hold to her sole and separate use, convey and devise, real and personal property, in the same manner as if she were unmarried.

It was provided by section 114 of the Code of Procedure, as it stood when this action was commenced, that where a married woman is a party her husband must be joined with her, except that, when the action concerns her separate property, she might sue alone.

Then, by section 399 of the Code, it was provided that a party to an action or special proceeding may be examined in his own behalf, or in behalf of any other in the same manner, and subject to the same rules of examination as any other witnesses. The statute makes *every party* a competent witness—there is no exception and the courts have no power to create exceptions to the operation of statutes unless the exception is necessary to prevent injustice, so obviously at war with the intention of the legislature, that it should be excluded.

The case of a married woman owning separate estate is not a case within any principle of exclusion. If it was wise and just that married women should have separate estates, which they could hold, manage and dispose of as if they were unmarried, and that they might sue and be sued in relation to such estates, it is equally right and just that they should be able to be witnesses in their own behalf, if all other persons were to be, or the right to hold property separately would be a curse rather than a boon.

The decisions of the court have not been uniform on this question, yet I think the weight of authority in the supreme

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court is in favor of holding the wife a competent witness. *Shoemaker v. M'Kee*, 19 *How. Pr.* 86; *Marsh v. Potter*, 30 *Barb.* 506; *Schaffner v. Reuter*, 37 *Id.* 44.

In this court there is no reported decision on the question, that I have been able to find. In March, 1863, the case of *Marsh v. Potter*, cited *supra*, was approved by this court, thus settling the question as to the competency of the wife.

The court below were right, therefore, in admitting the plaintiff to testify in her own behalf.

[The learned judge then examined the exceptions to the admission and exclusion of evidence, and was of opinion that there was error in excluding a question as to value, for which there ought to be a new trial; in which, however, the other judges did not concur.]

A majority of the judges concurred in the opinion of WRIGHT, J.

Judgment affirmed, with costs.

WELLS v. PIERCE.

December, 1866.

Although the assignee of one, who, by his own false representations was estopped from setting up against a mortgage made by him an outstanding title, is likewise estopped,—he is not precluded from purchasing such outstanding title, and then setting it up against the mortgage.

The statute limitation against an action to redeem does not impair the right of the party, if in legal possession, to defend his possession.*

A purchaser of land at its sale on the foreclosure of a junior mortgage can not recover possession against the owner of the equity of redemption of the prior mortgage in possession as such, although by the lapse of time the latter could not maintain an action to redeem.

Charles F. Wells and M. Montgomery sued Francis Pierce, in the supreme court, in an action in the nature of ejectment, for fifty acres of land, and damages for withholding it. One Sweet,

* See *Miner v. Beekman*, 14 *Abb. Pr. N. S.* 1.

who was the common source of title, conveyed the land, in 1839, to Daniel Fuller, and gave him possession, taking at the same time from him a purchase-money mortgage which was subsequently assigned to one Parish. In 1846, Daniel Fuller surrendered possession of the land to Parish, the holder of the mortgage; and Parish, in 1852, represented to one Newton that he was owner of the premises in fee, and he mortgaged them to Newton for a loan of seven hundred dollars, obtained on the faith of that representation. This second mortgage was assigned to one Guernsey, who, in 1857, brought an action to foreclose it, making Parish a defendant. At the sale in this foreclosure suit the premises were purchased by the present plaintiffs.

Pending the foreclosure suit, Parish assigned the prior mortgage to Asa Fuller, in payment of a pre-existing debt, and at the same time gave him possession—Asa Fuller having notice of the junior mortgage. Asa Fuller then obtained from Daniel Fuller a quit claim of the premises, and finally, after judgment and sale in the foreclosure suit, he conveyed the premises to the defendant Pierce, who was then already in possession.

The purchasers at the foreclosure sale now brought this action to recover possession.

The supreme court, held, in an opinion by GROVER J., that Asa Fuller, never having been under any obligation to restore possession, was not estopped. That although by 2 R. S. 312, § 57, the mortgagee can not gain possession by action without foreclosure, he may, if in possession, defend it. *Van Duzer v. Thayer*, 14 *Wend.* 233, and that when Asa Fuller, being in possession received a deed from Daniel, his subsequent possession was under that title; and the fact that a remedy he had no need to resort to was barred by the statute, did not prejudice him.

C. Tucker, for plaintiff, appellant;—cited, *Jackson v. Scissam*, 3 *Johns.* 499; *Dezell v. Odell*, 3 *Hill*, 216; *Van Dwyne v. Thayre*, 14 *Wend.* 235, 236; *Chaut. Co. Bank v. Risley*, 4 *Den.* 486; *Carver v. Jackson*, 4 *Pet.* 87; *Jackson v. Parkhurst*, 9

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Wend. 209; *Penrose v. Griffith*, 4 *Bin.* 231; *Wardell v. Howell*, 9 *Wend.* 170; *Root v. French*, 13 *Id.* 570; *Ray v. Birdseye*, 5 *Den.* 619; aff'g 4 *Hill*, 158; *Calkins v. Calkins*, 3 *Barb.* 306; 2 *R. S.* 302, § 52; *Code*, 132; *Murray v. Winter*, 1 *Johns. Ch.* 566.

George Barker, for defendant, respondent;—cited, *Waring v. Smyth*, 2 *Barb. Ch.* 119; *Denton v. Nanny*, 8 *Id.* 621; 15 *Johns.* 319; 2 *R. S.* 408, § 58, 3d ed.; *Stewart v. Hutchins*, 13 *Wend.* 485; *S. C.*, 6 *Hill*, 143.

BY THE COURT.—JAMES C. SMITH, J.—The defendant is entitled to judgment, on the strength of his legal title derived from Daniel Fuller, unless he is estopped, as the plaintiffs claim, from setting up such title in this action.

Upon that point, the plaintiffs argue that, as Parish, having represented to Newton, when he executed to him the mortgage upon the premises in dispute, that he owned such premises in fee, was estopped, as against Newton, from denying that he owned the fee, and that it was covered by the mortgage, it follows, that the defendant, being the vendee of Asa Fuller, who entered into possession of the premises under Parish, is equally bound by such estoppel, as against the plaintiffs, who, having purchased at the foreclosure sale, have succeeded to all the rights of Newton, as mortgagee. This argument would be unanswerable, if the defendant and his grantor, Asa Fuller, had no other title to the premises, than that which the latter derived from Parish.

But that is not the defendant's position. All that Asa Fuller acquired from Parish was an assignment of the Sweet mortgage, and the possession of the premises. His rights, as such assignee, while he held possession under the mortgage alone, were undoubtedly subject to the equities of Newton. But he subsequently bought in the equity of redemption, as he had a perfect right to do. The effect of such purchase was to merge in the fee his rights as mortgagee, and from that time he held possession as the owner of the legal title, which, while it was in the hands of his vendor, Daniel Fuller, was not affected by the rights and equities of Newton, and so continued after Asa

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Fuller acquired it, and after he transferred it to the defendant.

It is further claimed, however, by the plaintiffs, that Parish, when he put Asa Fuller in possession, was in legal effect, the owner in fee of the land ; that, as he had then been in possession, as mortgagee, ten years and more, after the mortgage debt became due, the equity of redemption was barred by the statute of limitations, and Parish, therefore, had a title that could not be defeated by redemption, and was perfect as against Daniel Fuller ; and that such title passed, under the Newton mortgage, to the plaintiffs by their purchase at the foreclosure sale.

In order to test that position, it is proper to regard the plaintiffs as having acquired the right of Parish, as assignee of the Sweet mortgage, before he assigned it to Asa Fuller ; which is the most favorable aspect for the plaintiffs in which the case can be viewed. If, in such case, they were now in possession, and the defendant, being the owner of the equity of redemption, were seeking to redeem, he would, apparently, be barred by the statute ; or, if he sought to recover possession, they could defend, as mortgagees in possession after forfeiture. But, although the plaintiffs, if in possession, might defend as mortgagees, they can not, on that ground, recover possession ; their only remedy is by foreclosure and sale. On the other hand, although the defendant would be barred by the statute, if he should bring an action to redeem, he is under no necessity of resorting to that remedy, and his inability to avail himself of it, if he should attempt it, does not affect his legal right to retain the possession. The statute cuts off the particular remedy merely.

In any view of the case, the defendant's possession, fortified as it is by the legal title, can not be disturbed in this action.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

Wendell v. Mayor, &c. of Troy.

WENDELL v. THE MAYOR, &c. OF TROY.

December, 1868.

Affirming 30 Barb. 329.

A municipal corporation is liable in an action for negligence in the construction of a work under a street undertaken by an individual for private benefit, where the work is done under permission of the corporation, with a condition that it is to be done under direction of a proper officer of the corporation, and no such supervision is bestowed by them upon it.

The construction, beneath the streets of a city, of drains, by private owners, to connect their premises with the sewers, is not an unauthorized use of a highway, which renders the individual making it liable for all damages resulting. The liability of either the private owner or the city corporation, in such a case, depends on the question of negligence or improper construction of the drain.

If the corporation consented to the making of the drain under the supervision of their officer and have agreed to exercise such supervision, they are liable to any third person injured by a defect in the structure. The fact that the imperfection was of a secret or hidden character, does not exonerate them, if it might have been detected by proper supervision of the work.

James V. Wendell sued the city of Troy to recover damages sustained by falling into a drain or sewer in a street of the city, while driving over it; defendants having given permission to an individual to construct the drain.

The drain in question was constructed by one Mrs. Birge, the owner of a house and lot on River-street, in the city of Troy, in order to connect her cellar with a drain in Hoosick-street, in said city. Soon after the work was commenced, it seems to have been stopped by some authority, and its direction altered, and upon application to the common council, authority was given to continue it by a resolution to that effect, with a condition annexed to the resolution, that the "work was to be done under the direction of the city commissioner."

There was no direct proof given as to the manner in which the work was done; so far as external appearances indicated, the drain was filled up in the usual manner; the earth was rounded up and seemed to present a substantially even surface.

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The fact that it was in progress was open and notorious; it was known to some of the city authorities that it was in the course of construction, but no attention was paid to it, and no directions in respect to the mode of its construction, or the character of the work in any respect, were given by any of the city officers. That the work was defectively constructed, appeared conclusively, by the casualty which happened to the plaintiff, which could not have occurred if the drain had been built, or the earth replaced and pounded as it should have been. There was no question of concurring negligence on the part of the plaintiff; and the case being one of sheer negligence on the part of some one engaged in the construction of the drain, the question was whether the city government was responsible in this action for negligence in the construction of a work for private use and benefit, where such work is built under permission of the public authorities of the city, with a condition that it is to be done under the direction of the appropriate city officer, and where no supervision or direction whatever has been given or bestowed in respect to it.

In his charge to the jury, the judge instructed them to inquire, first, whether the drain was negligently and improperly constructed; second, whether the plaintiff was injured by such negligence, and without any contributing negligence on his part; and, third, whether the drain was constructed by the authority and under the supervision of the common council, and in respect to this point, he charged that the resolution of the council was evidence of their consent, and that it was the duty of the council to send a competent officer to see that the drain was properly constructed.

To this third proposition there was an exception:

'The plaintiff had a verdict.

The supreme court, at general term, refused a new trial, and placed their decision, to some extent, if not wholly, upon the doctrine that where a municipal corporation give to an individual permission to construct works in or under a highway—such as a drain—for his own benefit, the corporation are liable for injuries resulting to third persons, from the negligent construction of the work, or, indeed, from any defect in

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the street caused by the structure. The corporation should not authorize such diversions of the highway to private uses ; and doing so without securing safety is negligence. Reported in 39 *Barb.* 329.

Defendants appealed.

W. A. Beach for defendants, appellants, insisted that it is lawful for citizens to connect their drains with public sewers, and that defendants were not liable if they had no notice of the secret or hidden defect in the construction ; that there was no evidence of defective construction, and that a defect could not be presumed from the fact of injury. *Holl v. Utica, &c.*, 12 *N. Y.* (2 *Kern.*) 236 ; *Parker v. Mayor, &c.*, 8 *N. Y.* (4 *Seld.*) 222 ; *Kelly v. Mayor*, 11 *N. Y.* (1 *Kern.*) 132 ; *Storrs v. Utica, &c.*, 17 *N. Y.* 109 ; *Mayor of Albany v. Cunliffe*, 2 *Id.* 165 ; *Barton v. Syracuse*, 36 *Id.* 54. See also 38 *Penn.* 355 ; 22 *Wend.* 446 ; 5 *Duer*, 677 ; 9 *N. Y.* 456.

John K. Porter, for plaintiff, respondent, insisted that the duty of the defendants to keep the streets safe was absolute. *Davenport v. Ruckmann*, 37 *N. Y.* 568 ; citing also 17 *Id.* 104 ; 29 *Id.* 591 ; 36 *Id.* 39 ; 32 *Id.* 422 ; 18 *Id.* 82.

BACON, J. [After stating above facts.]—I do not think it important to recapitulate in detail the several rulings and modifications stated by the court. Taken as a whole these propositions contain the theory, and present the principles upon which, as the defendant's counsel insisted, the case rested, and by which it was to be controlled. With some amplifications and changes of phraseology, they embrace substantially the following propositions, claimed by the counsel as governing this case, and which he was entitled to have charged :

1. That, if the jury found that the drain was constructed by a private citizen, under the authority of the resolution of the common council, and the work was not done or superintended by defendant, or any of its officers, and the street was not out of repair at the place of the accident, the defendant is not responsible for any imperfection in the construction of the drain. This instruction the court refused, and charged

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that, if the defective construction of the work made it unsafe, in fact, to pass on the street, the defendant was responsible for injury to a traveler who is himself guilty of no negligence. The proposition of defendant's counsel affirmed, that if the street to outward appearance was safe and secure, it was enough to protect the defendant, although, in point of fact, from a hidden defect not patent to the senses, it was entirely unsafe. The same proposition was subsequently repeated, slightly modified in terms, but to the same effect, and the court gave the same response.

2. That, under the evidence, the defendant was not charged with any duty in respect to directing or superintending the construction of the drain. This the court declined to charge; and, to the next request, that if any injury happened by a hidden imperfection not known to defendant, and which reasonable diligence could not discover, the defendant was not liable, the court assented as a general principle, but added, that, if the drain was constructed under the resolution, the defendant was bound to see to its proper construction.

3. The defendant further insisted, that the plaintiff was not entitled to recover without proving that defendant, through some or one of its officers, was guilty of negligence, by which the plaintiff was injured. To this proposition the court answered, that it was true generally, but that the city was guilty of negligence in not sending a competent and proper officer to oversee the work, if they omitted this duty. And the judge subsequently charged, that the common council must either have the supervision of the work, or an opportunity to supervise it, and that the latter would be the same thing.

These propositions, in their condensed form, present the theory of the defense and the grounds on which it is claimed there should have been no recovery in this case. They assert, that the city was charged with no duty whatever in respect to the construction of the drain, inasmuch as it was the work of a private citizen, by permission given therefor; and that, if there was no imperfection apparent from natural observation, there was no liability for any hidden defect; that the defendant was not charged with any duty in regard to superintending or directing the work; and, finally, that the plaintiff

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could not recover unless he proved affirmatively that the defendant, through some of its authorized agents, was guilty of actual negligence occasioning the injury.

The charge as given, together with the requests and refusals or qualifications, maintained in substance the converse of all these propositions. It held, that a duty was imposed upon the defendant, as a municipal corporation, to keep the streets and highways of the city in suitable repair, so as to render them safe for the traveler; that, although the work in question was one undertaken for private use and benefit, yet the city was not thereby discharged from the duty of oversight and direction, and responsibility for proper construction, especially as, in the resolution giving permission to perform the work, it was provided, that it was to be done under the direction of the proper city officer; that it was the duty of the corporation to send a proper and competent person to oversee the work; and, finally, that it was not enough, to relieve the defendant from liability, that there was no external indication of imperfection in the work which diligence could discover, provided the street was, in point of fact, unsafe, and although this might arise from a hidden defect not cognizable by outward observation.

This was, in my judgment, a correct exposition of the law, as it has been settled by the weight of authority running through a series of decisions in the courts of this State. Those authorities have been carefully collected in the able opinion of Mr. Justice HOGEBOM, delivered on the decision of this case at the general term, and their general result accurately stated, with the exception of one point from which I desire to express dissent. He states, as a proposition of law, that the use of the public streets of a city by an individual for the construction of drains for his private benefit is unauthorized, and makes the party liable for any damages resulting from such unlawful appropriation. He goes still farther, and maintains, that the corporation is responsible, because it was a breach of duty for it to allow the street to be thus diverted to a private use, and this liability exists notwithstanding the work may have been done with care, because the thing itself was unlawful, and no amount of care or labor bestowed

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upon the work could sanction such an illegal appropriation of the highway.

I may remark that no such principle as this is necessary to the determination of this case, and it was not put to the jury in any such aspect. Indeed, it was assumed, that the authority which the resolution professed to import, was properly given, and the breach of duty on the part of the public authorities, was in not performing their necessary function in supervising and directing the work. I can not assent to the proposition, that it is unlawful for a citizen to use the public streets for the purpose of connecting his premises with the main sewers of the city. If he has obtained the proper authority, his right thus to use them is unquestionable. This has been expressly held in *Barton v. City of Syracuse*, 37 Barb. 292, affirmed by this court in 36 N. Y. 54. So strongly is this held, that the court in the case cited, say "there is something very like a contract to be implied from the construction of a main sewer at the expense of adjacent property, that it may be used to drain that property by connecting it with the common sewer." But this does not of course absolve the party using the street for his convenience from the necessity of care in the construction of the work, nor the corporation from liability, through its remissness to respond in damages for any injury that may result from its negligent construction.

It is not important, as I have intimated, that the authorities should be collated which establish the principle on which the liability of the municipal corporation rests. This is the less necessary since the very recent decision of this court in *Davenport v. Ruckman*, 37 N. Y. 568. In that case an excavation had been made by the tenant of certain premises in the sidewalk opposite the same, so defectively that the plaintiff passing along the walk, fell into the excavation and was seriously injured. A recovery was had in an action against the owner of the premises and the city of New York, and this court affirmed the judgment. The work had been done by some former occupant of the premises, and the liability of the city was put upon the express ground of their obligation to see that the streets and sidewalks of the city were maintained and kept in good repair, and that if an injury occurred to any one,

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through defect in the streets or walks, the city was responsible, whether the injury arose from some act done by the corporation, or from an omission of duty on its part.

In the opinion of Chief Justice HUNT, he notices the objection that the city has no absolute duty in regard to keeping the streets in repair, and is only responsible for the results of their own imperfect execution of a work undertaken and carried on by them, and disposes of it, by saying that it was not a new suggestion, and had been settled by the cases he cites, and which had put the liability for acts of omission as well as of commission beyond further discussion.

The ground taken by the counsel for the defendant and insisted upon at the circuit in the proposition in which he asked to have charged, to wit, that the defendant was not liable for any unskillfulness or imperfection in the construction of the drain, provided there was no imperfection apparent from external observation, is pertinently answered by the judgment of this court, in *Congreve v. Smith*, 18 N. Y. 79, 82, that it is as much a wrong to impair the safety of a street by undermining it, as by placing objects upon its surface, and that the nature of the liability is not varied, whether the fee of the land on which the easement exists is in the corporation, or in him by whom the act complained of was done.

The exceptions to evidence received upon the trial were not well taken. The questions asked of both the mechanical and medical experts, were proper and are sanctioned by authority. *Conrad v. Trustees of Ithaca*, 16 N. Y. 158, 173; *Matteson v. N. Y. Central R. R. Co.*, 35 *Id.* 487, 492.

I think the judgment should be affirmed.

WOODRUFF, J.—I do not understand that the duty of the defendants to keep the streets of the city in proper repair, and the permanent road-bed in a safe condition for use by the public in passing and repassing, is called in question on this appeal.

To what extent that duty involved liability for accidents, arising from temporary obstructions therein from erections made by third persons, or the presence of extraneous matter, which question arose and was considered in *Griffith v. Mayor, &c. of N. Y.*, 9 N. Y. 456, is not material to this case.

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The main question is here, whether, admitting the defendants' duty as above stated, the defendants are liable for an injury resulting from an unsuitable construction of a sewer in or across a street, which renders it unsafe, where the evidence shows that such sewer was constructed by a private citizen, under authority of a resolution of the common council permitting the same, in order to connect the premises of the citizen with the main sewer in a neighboring street, "under the direction of the defendants' city commissioner?"

It would not be accurate to say that the construction of sewers through the streets of a city for the promotion of cleanliness, and the removal of water, otherwise running over the surface, or becoming stagnant in low grounds, or rendering dwelling-houses and cellars damp and unwholesome, stands upon the same ground in the law as excavations made for the private use of an individual, to promote his convenience, and having no relation to the public health or general well-being of the citizens at large.

And when main sewers are constructed by the public authorities, the use of them by the citizens in accordance with the purpose of their construction, by connecting their dwellings with them, is only bringing into practical effect that purpose and aiding in securing the general benefit, which the completed system promises to the health and comfort of the inhabitants.

The use of the streets of a city by making them the lines or routes of sewers, and the various branches thereof, is not a misappropriation of the highway, but a use long recognized as within the purposes, or at least entirely consistent with the purposes, for which the easement subsists, and may be declared to be more obviously so than the laying of gas-pipes, and water-pipes for the supply of the inhabitants with light and water.

Such a use is not, therefore, to be treated as involving the same legal consequences as an unauthorized excavation for private purposes above adverted to, and the cases of *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 5 Duer, 495, 18 N. Y. 84; and *Dygert v. Schenck*, 23 Wend. 446, do not necessarily determine the present. In those cases, the excavation of

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the public highway was deemed without authority, and to have been made wholly at the peril of the party making it; and therefore, such party was held liable for an injury to an individual resulting therefrom, irrespective of any question of care, skill, or diligent precaution. The defendants there had no right to make the excavation; and if they did so, they were held unqualifiedly liable for accidents resulting therefrom.

Not so here. It is lawful for the city to construct sewers in the line of the streets for the promotion of the public health and comfort, and, under proper regulations, it is competent to permit the citizens to connect their premises therewith by drains leading from their dwellings.

The public sewers are thereby, and only thereby, made efficient for the most important purposes of their construction.

The case of *Barton v. City of Syracuse*, 36 N. Y. 54, recognizes these rights and declares the duty of the municipal corporation to keep the sewers in repair. In most conclusive reasoning, it shows the importance of the connection of private dwellings therewith, and in the opinion it is added, "it becomes the right of every one occupying premises along the line, under proper restrictions for general protection, to use it by inserting a drain from his lot," and, "it seems, therefore, that the right of the plaintiff to connect his drain with the public sewer is placed beyond possible question."

The defendants, therefore, were not in the violation of any right, public or private, when they gave permission for the construction of the drain in question.

The parties constructing the drain, under a permission given by the defendants, were doing only what they might legally and rightfully do.

Neither, therefore, can be charged, on the mere ground that having without authority interfered with the public highway, they are responsible, at all events, for the consequences.

The question of liability, as a question of law in such cases, is a question of care and diligence, or of negligence. It is like the question, again and again presented to our courts, in actions against railroad companies, who are authorized by law to run their steam engines and trains in or across public highways; they are liable for accidents, if liable at all, not because

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they run their trains in or across such highway, but because, in the exercise of their own legal right, they are guilty of some negligence or omission in the performance of their duty to so use their own that others may not be injured.

In the present case, the liability of the defendants, if they are liable at all, is founded upon some negligence of theirs in the matter of the construction of the drain, or if such construction had made the street unsafe, then for some neglect of their general duty to keep the street in safe condition.

The opinion of DENIO, Ch. J., in *Conrad v. Trustees of Ithaca*, 16 N. Y. 158, 169, where he comments upon *Hickok v. Village of Plattsburg*, and compares it with the case then at bar, brings into view a distinction apt to this case. "In the case of *Plattsburg*, the trustees neglected to fill up the ditch which a wrong-doer had excavated in the street. It was held to be a corporate duty to keep the street in a safe condition. In this case the trustees built a bridge, which *they had a right to do*; but in doing it they proceeded negligently and unskillfully, and the plaintiff suffered an injury on that account." The village was held liable on that ground.

I think, therefore, that the proposition apparently sanctioned in the opinion of the court below, that "the liability is absolute and complete, notwithstanding any degree of care and diligence, because the structure was, under any circumstances, unauthorized," unsound, and the cases referred to do not apply here.

The construction of the sewer, or of the drain leading thereto, was not unlawful; and therefore the question, and only proper test of the defendants' liability, is, were the defendants in fault in the manner of the construction, or in not causing the defects to be remedied?

Notwithstanding this qualification of the opinion expressed at the general term, as I understand that opinion, I think the questions submitted to the jury at the trial were the true test of liability, and that in this respect no error was committed.

These questions, and the liability depending on the answer the jury might give thereto, were as follows:

1. Was the drain negligently and improperly constructed?
2. Was the plaintiff injured by reason of such defect and

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insufficiency, without any contributing negligence on his own part?

3. Was the drain constructed by the authority, and under the supervision of the common council?

The jury were instructed, if all of these questions were answered in the affirmative, the plaintiff is entitled to recover.

It will be seen that here the question of liability is made to turn solely on the negligent or improper construction of the drain, and the responsibility of the defendants therefor.

No matter how even and apparently safe the external appearance of the street was, from the time of the completion of the street until it fell in under the weight of the plaintiff's wagon. No matter whether the defendants had actual notice of the defects in the construction. They were declared liable if the drain was constructed by the authority and under the supervision of the common council.

And this responsibility was further explained by the instruction, that the resolution of the common council was evidence of their consent, and it was their duty to send a competent officer to see that the drain was properly constructed; and subsequently, that an opportunity to exercise such supervision was equivalent to actual supervision.

I think that in this there was no error. It is not and can not be insisted that such a drain could not by ordinary care and skill have been so constructed as to be perfectly safe.

The fact that it was not so constructed is found, and is, I think, not questioned.

The resolution of the common council which was given in evidence, is a distinct permission to the owners of the house, No. 456 River-street, to lay the drain, "the work to be done under the direction of the city commissioner."

Now, however true it may be that the corporate authorities are not under any such responsibility as insurers of the safe condition of the streets, that they become instantly liable for defects the moment they occur, and although they are caused by the act of a wrong-doer, and without any previous notice to them, calling their power and duty to provide for their safe condition into exercise, it is clear, I think, that when they consent that the public street may be excavated and a drain in-

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roduced, they have notice that an act is to be done which directly invokes their power and duty, and calls for its exercise in behalf of the public, to see to it that the property of those who have a right to pass and repass is not endangered by a hidden trap which superficial observation would not disclose; and supervision of the work to that end was therefore incumbent upon them.

To the suggestion, that it should nevertheless appear that they were notified that the owners were about to begin the work and were actually constructing the drain, it will suffice—passing by the evidence, that was not contradicted, tending to establish that the defendants' street inspector was more than once at the place of excavation during the progress of the work,—to say, that this work was not of a description that it could be suffered to go on from day to day from the beginning to its completion, and the defendants then claim, that, although it was done by their consent, they were so remiss in the discharge of their general duty of supervision of the streets that they did not discover it. Such a statement only aggravates their neglect. When a case in other respects similar shall arise in which the work consented to can be done so speedily, that consistently with the faithful performance of the defendants' duty to supervise the condition of the streets, it may be completely finished and all defects concealed from a careful examination without the knowledge of the city authorities that it has been begun, a different question will be presented. In such a case the instruction which was asked by the defendants on this trial might be proper, viz., "that if any injury happened to the plaintiff by reason of a hidden imperfection in the drain not known to the defendants or to either of their officers, and which reasonable diligence could not discover, the defendants are not liable."

But, in its application to this case, such an instruction was not called for; if it was intended thereby to submit to the jury, that reasonable diligence in the construction of the drain, or in the supervision thereof, could have been exercised by the defendants, and yet the imperfection be of such secret or hidden character as not to be detected, there was no ground therefor in the evidence.

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If it was meant, that, if, after the drain was completed, the imperfection was so concealed that the defendants did not know of its existence and could not by reasonable diligence discover it, the defendants are not liable; the refusal so to charge was correct, because all that might be true and yet the defendants have wholly failed in their duty to see to the manner of the construction while it was in progress.

I think the judgment should be affirmed.

All the other judges concurred in affirming the judgment, except GROVER, J., who was understood to doubt.

Judgment affirmed, with costs.

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December, 1867.

Affirming 37 Barb. 509.

A seller of goods for cash on delivery, who delivers without payment, can not recover possession from the master and owners of a vessel on which they have been shipped, after the master, in the usual course of business, and without notice, has given a negotiable bill of lading therefor to the fraudulent buyer.

Third persons making advances to the fraudulent buyer, in good faith and without notice, on the credit of such bill of lading, are also protected.*

The rule that one purchasing in good faith from a fraudulent vendor acquires a good title, is applicable to such cases.

The Western Transportation Company brought this action against Charles H. Marshall and others, in the supreme court, to recover the possession of a quantity of wheat, shipped by plaintiffs from Buffalo to New York, upon a canal-boat. The agents of the plaintiffs in the latter city agreed to sell the wheat for cash on delivery, to Meyer & Rec, who were engaged

* Compare *Wait v. Green*, 36 *N. Y.* 556; *aff'd* 35 *Barb.* 585; 63 *Id.* 241; *Ballard v. Burgett*, 40 *N. Y.* 814; *aff'd* 47 *Barb.* 646; *City Bank v. Rome, &c. B. R. Co.*, 44 *N. Y.* 186; *Austin v. Dye*, 46 *Id.* 186; *McNeil v. Tenth National Bank*, 46 *N. Y.* 825; modifying 55 *Barb.* 59; *Rawls v. Dasher*, in this volume, 40 *Id.* 319.

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in purchasing wheat, and shipping it to England. The latter agreed with the owners of the Great Western to ship the wheat to England on that vessel. At the request of Meyer & Ree, the wheat was measured in the usual way, and placed on board the vessel in the name of the agents of the plaintiffs. It was proved that the measurer was selected, and made the measurement according to the usual course of business between vendor and purchaser, made duplicate bills of the measurement, and delivered them to the agents, agreeably to the usual custom in that business; that the agents made out a bill of the amount of the price of the wheat, including the purchaser's proportion of the expense of measurement, &c., and delivered the same attached to the return of the measurer, intended for the purchaser, to Meyer & Ree; that the latter upon this return of the measurer, procured from the captain of the vessel a bill of lading of the wheat in the usual form, and upon this bill procured an advance from some of the other defendants, without having paid anything on account of the purchase of the wheat. Shortly after, the plaintiffs' agents sent to Meyer & Ree for the money for the wheat. The latter, after a day or two, gave the agents their check for the price of the wheat, which the agents deposited in a bank, and the next day the check was refused payment and returned to Meyer & Ree. It was proved that Meyer & Ree were in good credit at the time of the agreement to purchase the wheat, but suspended payment shortly after, in consequence of advice of non-payment of their drafts in England. It was proved that none of the respondents had any knowledge that the wheat was not paid for, or that the plaintiffs claimed any interest therein. It was proved that the universal custom of masters was to give bills of lading for grain delivered on board to a person producing the measurer's return intended for the purchaser; that this return was an exact duplicate of the one retained by the vendor, except that it called for payment of one-half of the charges only, and that the custom was known to all engaged in the grain trade. It was proved that plaintiffs' agents had been for some time engaged in this trade. Upon the return of the check to Meyer & Ree unpaid, the plaintiffs demanded the wheat of the master, and, upon his refusal to deliver the same, commenced the

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action. At the close of the proof, the respondents, who are the master and owner of the vessel, and the parties who made the advances to Meyer & Ree upon the bill of lading, moved for a dismissal of the complaint as to them, which was granted, and plaintiff excepted.

The judgment was affirmed by the general term. 37 *Barb.* 509. Plaintiff appealed.

John Hubbell, for plaintiffs, appellants.

Wm. Allen Butler, for the respondents.

GROVER, J.—There was no conflict in the evidence so far as these respondents were concerned. The plaintiffs' agents agreed to sell the wheat to Meyer & Ree for cash on delivery, and had the same, at the request of the latter, measured and placed on board the vessel in their names, receiving from the measurer two bills of the measurement, one designed to be retained by the vendor, and the other for delivery to the purchasers. They delivered the latter, together with a bill of the price of the wheat, to Meyer & Ree. The proof showed that the universal custom in trade was for masters of vessels to deliver bills of lading of grain on board, to the one producing this measurement prepared for the purchaser. This custom the agents are presumed to have known. By its delivery to Meyer & Ree, the agents authorized the master to deliver to them a bill of lading of the wheat just so effectually as though such authority had been expressly given by them. When the master had, by the authority of the agents, delivered a bill of lading to Meyer & Ree, he was not bound to deliver the wheat to the plaintiffs, without being discharged from the liability created by the bill. This was not done; nor was any indemnity offered by the plaintiffs against such liability. The complaint was, therefore, properly dismissed as against the master and owners of the vessel. It is equally clear that the bill of lading having been delivered to Meyer & Ree by authority from the plaintiffs, those who dealt in good faith with them, as owners of the wheat, will be protected in such dealings. Consequently, the complaint was rightly dismissed as to Morgan and others, who made advances to Meyer & Ree, on the

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credit of the bill of lading, and to whom the bill was transferred as security for such advances.

It was not material to the rights of the respondents whether Meyer and Ree acted in the premises with a fraudulent intent or not. One purchasing in good faith from a fraudulent vendor acquires a good title. *Mowrey v. Walsh*, 8 *Cow.* 238; *Root v. French*, 13 *Wend.* 570. The principle of these cases is applicable to the present case. Hence, the admission of the evidence that it was customary for purchasers of grain in the city of New York to raise money upon bills of lading thereof, to pay for the same, was wholly immaterial, and worked no prejudice to the plaintiffs in respect to these respondents.

The exception thereto is, therefore, not available upon this appeal.

The judgment appealed from should be affirmed.

All the judges concurred, except FULLERTON, J., who did not vote, and BOCKES, J., who was absent.

Judgment affirmed, with costs.

WHITE v. BULLOCK.

September, 1857.

Reversing 20 *Barb.* 91.

Under the Revised Statutes, which give compensation to executors in general terms, not providing for any apportionment among them upon equitable principles, if the surrogate could in any case apportion the commissions of co-executors unequally, on the ground of inequality in the services rendered by them, where he fails to do so, each is entitled to an equal share, irrespective of the inequality of service.* Officers compensated by a commission, are, in the absence of agreement, entitled to share equally, although the labor be not equally shared.

Charles L. White sued Robert Bullock, in the supreme court, to recover his half of commissions allowed by the surro-

* The apportionment of commissions between co-executors is now provided for by L. 1863, p. 608, ch. 362, § 8. See *Van Nest's Estate*, 1 *Tuck.* 130.

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gate on the settlement of accounts of the parties as co-executors of the estate of one Mounsey.

Plaintiff put in evidence the surrogate's decree adjusting the accounts of the parties as such executors; and also offered the accounts themselves, sworn to by each of the parties, which were excluded, on objection by defendant's counsel, that the decree decided that all but one hundred and twenty-one dollars was received by defendant alone, and not by defendant and plaintiff jointly. Both parties then rested, and plaintiff's counsel requested the judge to charge the jury that plaintiff was entitled to one-half the commissions named in the surrogate's decree, with interest from the date thereof; and that the surrogate's decree directs the commissions of the executors to be retained; and that the parties can not go back of the decree to ascertain the services rendered by each, to fix upon what each were to receive for commissions. That if any difference should have been made in the commissions to be received by the parties, it could have been made only by decree of the surrogate. The judge refused so to charge; and plaintiff's counsel excepted.

The judge charged the jury that if the surrogate's decree had found upon the amount of commissions to be received by each executor, it would have been conclusive, if that were a matter then within his jurisdiction, as to which no opinion was expressed. That as it stated only the amount to be paid to both executors, that amount must be decided between them in proportion to services rendered by each executor; and that without any other proof of their services, it was to be determined by the amount stated by the decree, to have been received and paid out by them respectively; that if it had been proved that plaintiff had rendered services in aid of the receipt and paying out of the five thousand eight hundred and seven dollars and seventy-eight cents received by defendant, or had become liable jointly with him for that amount, or for part of it, he would have been entitled to a fair compensation for that service. Plaintiff's counsel excepted to the charge.

The jury after retiring, returned and asked the judge if plaintiff was not equally responsible with defendant, for all moneys received by defendant for the estate. In reply, the judge

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charged that plaintiff was not so liable merely from being a co-executor. To which plaintiff's counsel excepted: and asked the judge to charge that an executor was always accountable for money received by his co-executor, if he aids or assents to its being received by his co-executor, or it is in his power to prevent the executor receiving it. The judge refused so to charge, as too broad a rule; and plaintiff's counsel excepted.

A verdict was rendered for plaintiff for three dollars and fifty cents. A motion for a new trial was denied at general term, and the judgment affirmed, with costs. Plaintiff appealed.

A. Thompson, for plaintiff, appellant. The surrogate having made no difference between the executors in the amount of commissions each was to receive, the presumption of law was that they were to be equally divided; unless defendant showed that he was entitled to the whole of the commissions.

J. W. Gerard, Jr., for defendant, respondent. The surrogate's settlement and allowance of the accounts, was conclusive, and the decree final, 2 *R. S.* 4th ed. p. 281, § 78. And the introduction of the accounts to contradict the decree was therefore inadmissible. But if admissible in evidence, they would only indicate what moneys were received and what paid out for the estate, but not the liability of the executors. Each executor was entitled to commissions, not for services or responsibilities, but for moneys passing through his hands. 2 *R. S.* 2d ed., p. 93, § 58; and is liable merely for his own acts and what he receives. *Sutherland v. Brush*, 7 *Johns. Ch.* 17; *Dougllass v. Satterlee*, 11 *Johns.* 16; *Messick v. Messick*, 7 *Barb.* 120; *Bogert v. Hertel*, 4 *Hill*, 492.

BY THE COURT.—*S. L. SELDEN, J.*—The Revised Statutes, in prescribing the compensation to be allowed to executors and administrators, upon the settlement of their accounts before the surrogate, gave, in terms, no power to the surrogate to apportion that compensation among them where there were several. It is possible as intimated by the chancellor, in *Valentine v. Valentine*, 2 *Barb. Ch.* 430, that even prior to the

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latter act, the exercise of such a power would have been considered within the general range of the surrogate's jurisdiction.

But upon the settlement of the executor's accounts in this case, which took place prior to the act of 1849, the surrogate made no apportionment; all that he did which would have any bearing upon this subject, was to adjust and settle as between the executors, the relative amounts which each had received and paid out.

Now, admitting, as the learned judge upon the trial assumed, that the sums so raised and paid, would, in the absence of all other proof, afford presumptive evidence, were that question properly in issue, of the amount of service which each had rendered, yet it by no means follows that he was right in instructing the jury that they might apportion the compensation upon that basis.

As the Revised Statutes, upon which the question wholly depends, gave the compensation to the *executors* in general terms, without providing for any apportionment among them, upon equitable principles, the legal consequence clearly was, that when there were several executors, the compensation was to be divided equally among them. This right to compensation was a strict *statutory* right, not depending upon any equities whatever, and each was entitled to what the statute gave. The case is precisely analagous to that of two attorneys jointly employed in the same suit, under the old system of attorney's fees, one of whom had collected the entire tax-bill. In an action by the other to recover his share of the fees, no one, I imagine, even supposed that the defendant could set up that he had performed more than half the labor, and therefore, was entitled to a proportionate share of the fees. Were the legislature to appoint three commissioners, to superintend the erection of some public building, and to disburse the necessary funds, giving them a certain percentage upon the amount expended, by way of compensation, no one would contend, in the absence of any agreement among themselves, that one could legally claim more than his ratable share of the compensation, on the ground that he had performed more of the labor than his associates.

Until the principle of equitable apportionment was intro-

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duced by the act of 1849, I doubt whether even the surrogate, notwithstanding his plenary jurisdiction over the whole subject of the settlement of estates, had power to deprive either of the executors of any portion of the compensation to which he would be entitled by the terms of the statute. But, however this may have been, I think it quite clear, that a court of law, in the absence of any direct action of the surrogate on the subject, could have no real power. This conclusion renders it unnecessary to pass upon any of the other questions raised upon the argument. The judgment should be reversed, and a new trial ordered, with costs, to abide the event.

Judgment accordingly.

WHITE v. HAVENS.

September, 1860.

The maker of a premium note given to a Mutual Insurance Company, is liable to be assessed thereon for losses whether occurring on cash premium or note premium policies, the fund produced by cash premiums having been exhausted.*

Justus White, receiver of the Union Ins. Company, sued Dexter E. Havens, in the supreme court, on defendants' premium note.

The only point made by the defense was that it was illegal to assess the note for losses arising on policies based on cash advance premiums, for which no premium note had been made.

Cox & Avery, for the defendant, appellant.

Henry R. Mygatt, for plaintiff, respondent.

WRIGHT, J.—The case of *Mygatt v. N. Y. Protection Ins. Co.*, 21 *N. Y.* 52, is decisive of the present one. That case turned upon the legality of the act of a company organized under the act of 1849, c. 308, in issuing policies of insurance in part for cash premiums advanced in full for insurance, and

* Followed in *Jackson v. Roberts*, 31 *N. Y.* 304. As to what proves the exhaustion of the cash fund,—see *Cooper v. Shaver*, 41 *Barb.* 151.

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in lieu of premium notes. This court was of the opinion that there was nothing in the act of 1849, either in terms, or in its design or intention, which prohibited a company, formed on what is called the mutual principle, from issuing policies on the receipt of cash premiums, if its charter and by-laws authorized and provided that it might do so; and that such policies were valid and binding, though issued to mere outside parties, without any reference in themselves to the principles of mutuality. But that if this were otherwise, it was indispensable that the mutual principle should be observed in all policies issued by a mutual company, the result would not be different, as the holders of cash policies were members of the corporation and mutual contributors to a common fund for the payment of losses; the cash premium as well representing the insured in the common fund as the premium note.

The charter of this company in the present case, like that in *Mygatt v. N. Y. Protection Ins. Co.*, provided for receiving premium notes for insurance from the insured, payable at such time or times, and in such term or terms, as the corporation should from time to time require; and any person applying for insurance, so electing, might pay a cash premium in addition to a premium note, or a definite sum in money, to be fixed by the corporation, in full for insurance, and in lieu of a premium note. The company, during its existence, issued about two thousand five hundred cash policies, and about two thousand policies founded on premium notes.

The sum of forty-three thousand dollars was paid to the company in cash premiums, and the entire amount expended by it in payment of its liabilities. A policy was issued to the defendant about January 23, 1852, and he gave his premium note for one hundred and twelve dollars, paying an assessment thereon of fifteen dollars and forty-seven cents, and this was all that he ever paid or was called upon to pay. In June, 1853, all the money of the company had been expended in the payment of losses, and no assets came into the receiver's hands but the premium notes, included in which was that of the defendant. The company seems to have been peculiarly unfortunate; for when it became insolvent, in June, 1853, there was due from it for losses on policies founded on premium notes,

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an amount between twenty thousand and twenty-five thousand dollars ; and there was claimed to be due for losses on cash policies an amount exceeding thirty thousand dollars, and this in addition to the sum of forty thousand dollars previously paid. There was sixty thousand dollars of premium notes in the commercial department to which the defendant belonged. The receiver, acting in pursuance of an order of the supreme court, assessed the premium notes in the commercial department (including that of the defendant), to meet losses and liabilities incurred in that department, part of which losses happened upon risks taken upon cash premiums. The defendant had notice of this assessment, and it was subsequently confirmed by the supreme court, and the receiver authorized and directed to bring suits to enforce the collection of such assessment.

The defendant raised but a single point against a recovery, on the trial, viz : The illegality of the assessment to pay losses arising on the policies of insurance based on the cash advance premium, and for which policies no premium note was made. This is no ground of defense. The cash policies were not issued by the company without authority or in contravention of law ; but in doing so it did not lose its character of a mutual company.

The cash policy-holders were members of the corporation as much as were the holders of policies based on a premium note. They were contributors to a common fund, as the capital of the company, to meet losses that might occur. They paid their premiums in cash, instead of notes or promises to pay. The premiums were to be first applied to the payment of liabilities, and no part of them could ever be withdrawn, though they should not have been all expended. In this case over forty thousand dollars of cash premiums was expended for paying liabilities, thus relieving the premium note of the defendant and others. If this company had been reasonably prosperous, the cash premiums would nearly or quite have paid its losses ; calling for no assessment on the premium note-holders of policies. But it was not, and the cash being exhausted, the premium notes must bear the burden of the losses of the company, whether occurring on cash policies, or those founded on

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premium notes. This should be so on the plainest principles of justice.

I think the judgement of the supreme court should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

WHITE v. LESTER.

September, 1864.

The omission of the loan commissioners to enter in their minute book the order for, and a copy of the advertisement of sale, and a designation of the places where, and the persons by whom, the advertisement was posted, does not affect the vitality of the sale, as against a *bona fide* purchaser, ignorant of the irregularity.

A purchase of lands by a bank cashier, for the benefit of his bank, is not necessarily invalid because the bank by its charter is disabled from purchasing lands.

Where both the commissioners for loaning United States moneys are present at, and make, a sale of mortgaged premises, the fact that the entry of the sale in the book of minutes, though purporting to be the act of both, was made by one only of them, and was signed only by him, does not amount to a fatal irregularity.*

William D. White sued Ebenezer A. Lester and others, in the supreme court, in ejectment, to recover a lot of land lying in Fredonia, Chautauqua county.

The only questions made in this court arose as to the regularity and effect of proceedings to foreclose a mortgage given by one Saxton, under whom both parties claim title, to the commissioners for loaning United States money.

The supreme court gave and affirmed judgment for the de-

* See *York v. Allen*, 30 *N. Y.* 104. Previous sales by one commissioner under the U. S. Loan Commission Act of 1837, was legalized, and sales by one commissioner, in case of a vacancy, authorized, by *L.* 1863, p. 109. c. 73, §§ 6, 9.

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defendants, on a verdict found on the facts stated in the opinion. Plaintiff appealed.

William D. White, appellant, in person, as to the indirect purchase by the bank, cited *Ohio v. Pell*, 7 *N. Y.* 328; *Chautauqua Bank v. Risley*, 19 *N. Y.* 369. As to date of sale, *Sherwood v. Read*, 7 *Hill*, 431; *Olmsted v. Elder*, 5 *N. Y.* 144.

That the purchaser was bound to take notice of the defects. *Sherwood v. Read*, *above*. *Sharp v. Speir*, 4 *Hill* 76. The deed was individual, not official. *Townsend v. Corning*, 23 *Wend.* 435; *White v. Skinner*, 13 *Johns.* 307; *Guyon v. Lewis*, 7 *Wend.* 24; *Hanford v. McNair*, 9 *Id.* 54.

C. Tucker, for defendants, respondents, cited *Pell v. Ulmar*, 18 *N. Y.* 139; *King v. Stow*, 6 *Johns. Ch.* 323; *Hartwell v. Root*, 19 *Johns.* 345; *Cow. & H. notes*, 396, 397; *Hickman v. Skinner*, 3 *Munr.* 211.

BY THE COURT.—HOGEBROOM, J.—The plaintiff sues in ejectment to recover from the defendants the possession of certain premises in Chautauqua county. He claims title through John Z. Saxton, who was the admitted owner in 1837, and he showed a regular deduction of title from and through him, sufficient to maintain the action unless it is defeated by facts to be hereafter noticed. The defendants also claimed through Saxton, who, in August, 1837, executed to the commissioners for loaning certain moneys of the United States, a mortgage upon said premises pursuant to the *Laws* of 1837, c. 150, on which default was made in paying the interest due in October, 1842. On Dec. 6, 1842, an entry was made of this circumstance, and of the fact that the premises were advertised for sale for the first Tuesday of February then next, in the commissioners' book of minutes and in their annual report to the comptroller. The premises appear to have been duly advertised for sale by publication and posting in the manner required by law, except that there was no *order* for the advertisement entered in the minute book; nor copy of the advertisement entered therein; nor entry of the places where, or of the persons by whom, the advertisements were put up; all of

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which was enjoined by the statute before referred to. The substance of the statute appears to have been observed in regard to the actual advertisement, and I am inclined to think the provisions as to the entries in the minute book above referred to were, notwithstanding the declaration of the statute, section (33), that "all purchases made contrary to the provisions of this section (33) shall be void," directory rather than compulsory, as against a *bona fide* purchaser ignorant of the irregularity. These irregularities were not violations of the provisions of section 33. *King v. Stow*, 6 *Johns. Ch.* 323.

On Feb. 7, 1843, up to which time the plaintiff appears to have been in possession, the premises were duly sold by both commissioners, and struck off to one Newland, who then, or within a few days thereafter, received a deed in due form from the commissioners, went into possession and executed to the commissioners a new mortgage upon the premises. The defendants deduce a regular title through him. He paid his bid in cash to the commissioners, and the bid and subsequent transfer of title to the defendants was in his name, though he purchased, in fact, as the case states, for the benefit of the Chautauqua County Bank, but without any direction from the directors, by which I understand is meant that that institution was, by the purchaser, intended to have the benefit (if any) of the purchase. I scarcely think this was a violation of the charter of the bank (*L.* 1831, c. 219), as the purchase was purposely made in the name of Newland and the title designed to be kept in him, although, if the premises were subsequently sold at a profit, he meant that the bank of which he was the cashier should have the benefit of it. There was no disability in Newland to purchase, as there is in the case of trustees with regard to the lands of their beneficiaries, and therefore the purchase would not, I think, be void, but would inure to the benefit of Newland, if it could not be for the benefit of the bank. Such a transaction would not avoid the sale as against the plaintiff.

Although both commissioners were present at and made the sale, the entry of it in the book of minutes was made by only *one* of the commissioners and signed only by him, though purporting to be the act of both. This is claimed

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to be a fatal irregularity, under the case of *Olmsted v. Elder*, 5 N. Y. 144. But no such point was presented in the latter case; and since the case of *Pell v. Ulmar*, 18 N. Y. 139, it must be regarded as overruled. Moreover, there is nothing in the law which requires this entry to be *signed* by the commissioners; and purporting, as it does, to be the *act of both*, we can not presume against the truth of such a statement, simply because it is certified to be true by the signature of one commissioner.

There would appear, therefore, to be great doubt whether, if the case for the plaintiff rested upon the irregularity of the proceedings to foreclose the loan office mortgage, they were sufficiently defective to make them invalid. But I think an effectual answer to the plaintiff's claim consists in a fact now to be noticed. The plaintiff, who succeeded to the title of the mortgagor, suffered the mortgage to become foreclosed by operation of law, by his delinquency in paying the amount due by the terms of the mortgage. This was held, in *Pell v. Ulmar*, 18 N. Y. 139, 145, to be equivalent to a foreclosure pronounced by the decree of a court, and nothing remained in the plaintiff but a special privilege of redemption. The plaintiff went out of possession, and the defendants (or Newland), took immediate possession, under a deed dated as of the day of the sale, and executed a few days afterward. It does not appear, it is true, as suggested by the plaintiff, that the commissioners took *actual* possession. They had no right to do so until after the day of sale, and then they did so in effect by putting their grantee in possession, who, or his successor has occupied ever since. If we assume that the alleged irregularities in the sale were sufficient to vitiate it as such, nevertheless the default in the payment of the interest, as was held in the case of *Pell v. Ulmar*, from which this case can not be distinguished, destroyed and foreclosed the plaintiff's title;—destroyed even his common law equity of redemption, and left him nothing but a special right of redemption, to be enforced only by strict compliance with the provisions of the act of 1837. He had, therefore, no right which could be prosecuted by action of ejectment against the commissioners or their assignees. Newland took possession under the authority and

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consent of the commissioners, and having paid the amount of the mortgage, must be regarded, equitably at all events, as a mortgagee in possession. If in under such a title, he could not be dislodged by an action of ejectment ;—for such an action is forbidden by the Revised Statutes. 2 R. S. 312, § 37. But the case of Pell v. Ulmar holds that his rights are even less perfect than would be those of a mortgagor against a mortgagee in possession. The plaintiff's counsel has attempted, but I think unsuccessfully, to distinguish this case from Pell v. Ulmar. He is mistaken in supposing that Newland never took possession under his deed from Green & Douglass; and I think also, in supposing that the deed was their *individual* deed. It *purported* to be on its face the deed of the commissioners, and such was the effect of the *acknowledgment*.

The judgment should be affirmed.

All the other judges concurred, except H. R. SELDEN, J., who did not vote.

Judgment affirmed, with costs.

WHITE v. ROSS.

September, 1860.

A person who has dealt with a corporation de facto, can not avoid liability to it on the contract, by questioning the validity of the organization.*

An act of the legislature recognizing the existence of a corporation—*e.g.* changing its name—cures irregularities in its organization.

A mutual insurance company formed under the general act of 1849, L. 1849, p. 441, c. 308, may, under the power to determine "the mode and manner" of exercising its powers, divide risks into classes according to hazard, so that a note shall, in the first instance, be assessed only for losses of the class to which it belongs.

But if need be, the whole assets, including notes on both classes, must be applied for payment of losses in either class.†

* Followed in Sands v. Hill, 42 Barb. 651.

† To the same effect, Sands v. Boutwell, 26 N. Y. 233; Sands v. Sanders, Id. 239; Cooper v. Shaver, 41 Barb. 151; though it is doubted by the reporter, at p. 236, note, and opposed in Sands v. Shoemakers, vol. 4, p. 149, of this series.

White v. Ross.

Justus White, as receiver of the Union Insurance Company, sued Giles Ross and others on a premium note given by them to the company.

The company was originally incorporated as the Union Mutual Ins. Co., under *L.* 1849, p. 441, c. 308.

By a special act, *L.* 1851, p. 775, c. 395, the charter was amended by omitting the word "Mutual" from the name of the company, and limiting the number of directors.

The plaintiff having been appointed receiver of the corporation, brought this action and recovered judgment in the supreme court, and the defendants appealed.

Cox & Avery, for the defendants, appellants.

Henry R. Mygatt, for the plaintiff, respondent.

BY THE COURT—BACON, J.—Two questions only are made by the defendants' counsel upon this appeal. The first is, that the company, of which the plaintiff is receiver, was not duly incorporated. There are two conclusive answers to this objection. In the first place, the defendants were members of the corporation. They became such members when they delivered the note upon which this suit is prosecuted, and received their policy. Having thus dealt with it as a corporation *de facto*, they can not now be heard to question the validity of the organization. That can only be impeached by the sovereign power of the State.

But in the second place, if there were any errors or informalities in the mode of its formation, they were cured by the law of 1851, which recognized the existence of the company and changed the corporate name. This is the highest exercise of the sovereign power by which, in effect, the people speak, and waiving the defects of the organization, if such exist, declare the corporation to have existence not only, but to be endowed with all the faculties necessary to corporate life and action. *Buffalo & N. Y. City R. R. Co. v. Dudley*, 14 *N. Y.* 336. The power which prescribes the formalities to be observed in creating a corporation is able to dispense with them. This is expressly adjudged in *Black River & Utica R. R. Co. v. Barnard*, 31 *Barb.* 258.

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The second objection to a recovery, taken by the defendants' counsel, is, that the assessment which was and ought to be enforced in this suit, not being upon the whole capital, but on a part only, was void. The company of which the plaintiff is receiver, it seems, divided the applications for insurance into two classes, one of which was termed the commercial, the other the farmers' class; the rates being adjusted upon different scales in respect to what were supposed to be the different degrees of hazard of the two classes, and the notes were only to be assessed for losses in the department to which they belonged. This was done in accordance with the 11th section of the charter of the company, which provides in express terms for such a division.

The ground of objection to this, is alleged to be that in effect it creates two organizations: that it destroys the element of what is called mutuality, and does not subject the whole assets *in solido* to the payment of all the risks assumed. These objections are in part unfounded in fact, and so far as such an arrangement is supposed to contravene the spirit of the act of 1849, authorizing the formation of insurance companies, the question is, I think, disposed of by the decision of this court in the recent case of *Mygatt v. N. Y. Protection Ins. Co.*, 21 *N. Y.* 52. By the 11th section of the act of 1849, the incorporators were authorized to declare in their charter "the mode and manner" in which they were to exercise their corporate powers. This was held, in that case, to transfer to the companies which should organize under the act full legislative control over the subject, and invest them with power to provide for any kind of insurance permitted by the act, and to regulate what may be called their internal economy, in such way as to the directors should seem prudent and best, so long as they did not contravene any express provision of the act under which they organized.

The provision in the charter of this company is not in conflict with any provision of the act of 1849, that has been pointed out, and it can not, with any propriety, be said that there are two organizations. The division of risks into classes is only one of the "modes or manners" in which the company chooses to transact its business, and has not as much diversity

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as the two modes of insurance on the cash and premium-note systems, which it is now settled, can be united under one organization. "If," as is said by Judge PAIGE, in *Sheldon v. Roseboom*, 29 *Barb.* 309, *note*, "the capital to be applied to the payment of losses is to be divided, so are the risks. If the capital is less for each defendant, so are the hazards."

Both classes are to be assessed by the receiver, and in truth, I suppose, it can not be doubted, that all the notes of the company constitute its capital, and that, although the notes of one department must first be assessed to pay the losses in that department, yet, if they are found not to be sufficient, and anything remains in the other department beyond paying the claims upon it in that branch, resort must be had to those remaining assets until the whole are exhausted. And this is an answer to that part of the objection, which insists that the whole assets must be applied to the payment of all the risks assumed by the company. If the necessity exists, resort must be had to the entire fund. It is precisely the principle which subjects the premium notes to contribution for losses on the cash policies, after the funds of that department have all been applied.

The judgment must, in my opinion, be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

WEIGAND v. SICHEL.

December, 1866.

Affirming 34 *Barb.* 84.

In an answer alleging a defect of parties, defendant must state precisely and truly who were the parties, and an error wholly vitiates the answer. This is an action for goods sold, an answer that A. and B. were partners with defendant and should have been joined, is not sufficient to admit proof that A. was a partner.

The rule requiring the production of a subscribing witness to prove the execution of an attested instrument is not affected by the Code.

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Where the making of a contract giving credit is induced by fraud, the creditor may sue upon the implied agreement founded on the consideration of the contract, and may prove the fraud under the ordinary complaint for goods sold, &c., for the purpose of avoiding the stipulation as to credit.

Henry L. Kayzer and Francis Weigand (the former of whom died pending the suit) sued Max and Solomon Sichel, in the supreme court, to recover the amount of a bill of goods sold by the plaintiffs to the defendants, in the summer of 1858. The original complaint contained two counts, one for goods sold, the other for the value of the same goods obtained by fraud and converted. The court ordered the plaintiffs to elect between these counts, and they amended by striking out the latter count. The complaint, as amended, was the ordinary one for goods sold and delivered.

The defendants pleaded a non-joinder of George Mann and Adolphus Knorr, as codefendants, also, that the goods had been purchased on a credit, which had not yet expired, and that they had given their promissory notes to the plaintiffs for the amount of the purchase. On the trial, the plaintiffs proved the sale and delivery of the goods on a credit of four months, for which the defendants gave their own promissory notes; the plaintiffs also proved that the credit was obtained upon representations grossly false and fraudulent; that they had, in vain, sought the defendants, to offer a return of the notes before suit commenced; and that the defendants fraudulently concealed themselves, and they produced and offered to cancel the notes on the trial. The plaintiffs recovered at the circuit.

The supreme court held that under an allegation that two persons were partners with the defendants, articles of co-partnership showing that one of them was, were inadmissible. That the rule requiring the production of subscribing witnesses is not modified by the Code; and that on the authority of *Roth v. Palmer*, 27 Barb. 652, plaintiffs might disregard the express agreement for a credit and recover immediately on the implied agreement. Reported in 34 Barb. 84.

S. L. Hull and *E. W. Dodge*, for defendants, appellants;—That the articles were admissible, cited, *Halliday v. McDougall*, 22

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Wend. 267, 276; that under the complaint as amended, fraud could not be proved, *Lane v. Beam*, 19 *Barb.* 51; *Andrews v. Bond*, 16 *Id.* 642; *Sellar v. Sage*, 12 *How. Pr.* 531.

William C. Stafford, for plaintiffs, respondents;—cited, *Osborn v. Bell*, 5 *Den.* 370; *Kingman v. Hotailing*, 25 *Wend.* 423; *Masson v. Bovet*, 1 *Den.* 69; *Roth v. Palmer*, 27 *Barb.* 652; *Pierce v. Drake*, 15 *Johns.* 475; *Monroe v. Hoff*, 5 *Den.* 360; *Corlies v. Gardner*, 2 *Hall*, 345; *Adams v. Mayor, &c. of N. Y.* 4 *Duer*, 305; *Wolfe v. Hawes*, 24 *Barb.* 174; *Esselstyn v. Weeks*, 12 *N. Y. (2 Kern.)* 635; *Gilbert v. Cram*, 12 *How. Pr.* 455; *Fisher v. Conant*, 3 *E. D. Smith*, 199; *Code*, § 173, and cases cited in *Voorhies'* ed.; *Hawks v. Munger*, 2 *Hill*, 200.

BY THE COURT.—HUNT, J. [After stating the facts.]—The appellants' points present three grounds of objection, which I will consider in the order in which they are presented. It is claimed that an error was committed in excluding the proof of certain articles of copartnership, entered into on April 20, 1858, between Max Sichel, Solomon Sichel and George Mann. As a part of their answer, the defendants had pleaded, that the supposed promises, in the complaint set forth, if any such were made, were made jointly, with George Mann and Adolphus Knorr, and not by the defendants alone; and they prayed that the plaintiffs' action might abate, on account of the non-joinder of said Mann and Knorr. On the trial, the defendants offered in evidence the articles of copartnership mentioned, to sustain this defense in abatement. It was excluded by the judge. A plea in abatement that Knorr and Mann were copartners, and should have been codefendants, was not sustained by evidence that Mann was such partner. The defendant, by his plea, must give the party a better writ, that is, he must state precisely and truly who were the parties to the contract; and if he fails to do this, his plea fails also. To sustain the plea, it must appear that there is neither a greater nor less number of parties than is set up in the plea. *Hawks v. Munger*, 2 *Hill*, 200. The paper was not offered in connection with evidence to prove that Knorr was also a partner; and, indeed, it

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was explicitly proven by Knorr that he never had been a partner in the business. There was no error in this ruling, and this, independently of the question of the incompetency of written articles to prove the fact alleged.

The defendants afterward offered in evidence a release, signed by Max Sichel and Adolphus Knorr, reciting a former partnership between them, and mutually releasing each from all claims in favor of the other. This paper was signed by John Herts, as a subscribing witness, and the plaintiffs objected to its admission, unless proved by the subscribing witness. The law on this point remains unchanged, and the objection was undoubtedly valid. There was no error of the judge in excluding this paper. If admitted, the release could have had no possible effect. It did not relate a partnership of Knorr with Max Sichel and Solomon Sichel, but with Max Sichel alone. This could not have been in reference to the partnership sued, as to which it was admitted, by the pleadings that Solomon was a member. If it was intended that the paper should connect Knorr as a partner of the firm sued, it could have no such effect, and was quite immaterial.

The last objection, urged by the defendants, is upon the form of the action. The complaint, as amended, was in the ordinary form for goods sold and delivered, and a cause of action was proved, in the manner and of the character I have already stated. The defendants now object that, upon these pleadings, it was error to allow the plaintiffs to prove a fraud, for the purpose of avoiding the contract upon which they had counted.

It is settled by numerous authorities, that, under the circumstances existing in this case, the plaintiffs were not bound to bring an action for the deceit, or an action of trover or replevin, but could waive the tort and bring assumpsit at once for the value of the goods. *Roth v. Palmer*, 27 *Barb.* 652; *Masson v. Bovet*, 1 *Denio*, 69; *Osborne v. Bell*, 5 *Id.* 370; *Kingman v. Hotailing*, 25 *Wend.* 423.

It is not accurate to say that the plaintiffs sought to avoid the contract of sale. It is the credit, only, that is sought to be avoided. It was the sale of goods which the plaintiffs, by their action affirmed. It was, however, a sale where the credit was obtained by fraud, and, in law, amounted to a sale for cash.

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In stating it in their complaint, therefore, to be a sale, and for cash, the plaintiffs but stated the contract according to its legal effect. They did not seek to avoid the contract of sale. They endeavored, merely, by proof of the act of fraud, to reduce the transaction to a cash sale. The complaint and the proof were to the same purport.

The judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed, with costs.

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December, 1864.

Affirming 12 Abb. Pr. 319; S. C. 21 How. Pr. 40.

The removal of a prisoner having the liberties of the jail, from the limits thereof by virtue of a valid legal process which affords justification to the officer taking him thence, is not an escape within 2 R. S. 437, § 63.*

Either house of Congress may issue its warrant or attachment to bring before it, for the purpose of giving necessary evidence in legislative proceedings, a witness charged with contempt, and by such process may take him from the custody of the sheriff by whom he is imprisoned on execution in a proceeding in a State court. Congress is not restricted to proceeding by *habeas corpus* in such cases.

Jacob Wickelhausen (for whom, on his death pending the action, Ann Wilckins and Thomas Achellis, executors, were substituted as plaintiffs) sued James C. Willett, sheriff of the county of New York, in the New York superior court, to recover damages for the escape of one Williamson, a prisoner on civil process, who was taken from the sheriff's custody to answer for contempt at the bar of Congress. The facts are stated in the opinion.

On the trial, defendant had a decision in his favor, and the judgment entered thereon was affirmed by the court at general

* See *Carpentier v. Willet*, vol. 1, p. 312, of this series.

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term, on the ground that, at the time the action was commenced, Williamson was off the limits, not by any act or agency of his own, but compulsorily, by process and authority of law, and that therefore his being so off was no more an escape than if he had been at the time removed and held by *habeas corpus ad testificandum*, or by force of a valid judicial order.

From this judgment the plaintiffs appealed to this court.

Charles P. Kirkland, for plaintiffs, appellants.

A. J. Vanderpoel, for defendant, respondent.

BY THE COURT.—T. A. JOHNSON, J.—John D. Williamson, for whose alleged escape this action was brought, was imprisoned upon an execution duly issued against his person in the city of New York, and had secured the right of the jail liberties. While thus situated, he was served with a subpoena, in due form of law, to attend and give evidence before the house of representatives of the United States Congress, or a committee thereof, and failing to appear, was adjudged guilty of a contempt. A warrant, in the customary form, was thereupon issued and delivered to the sergeant-at-arms, to arrest said Williamson, and bring him before the said house, at the bar thereof, to answer to the said charge of contempt, and to be dealt with according to the constitution and laws of the United States.

In pursuance of this warrant, the sergeant-at-arms, on Feb. 2, 1858, arrested said Williamson within the jail liberties, and took him, and compelled him to go to Washington, under and by virtue of the said warrant, and before the bar of said house. He was detained upon said process until the 9th of the same month, when he returned to the liberties of the said jail. This action was commenced against the sheriff on Feb. 5, and before the return of said prisoner.

Was this an escape for which the sheriff was liable?

Our statute (2 R. S. 437, § 63) provides, that "if any prisoner committed to any jail on execution in a civil action, or upon an attachment, for the non-payment of costs, shall go or be at large without the boundaries of the liberties of such jail, with

out the assent of the party at whose suit such prisoner was committed, the same shall be deemed an escape of such prisoner, and the sheriff having charge of such jail shall be answerable therefor to such party for the debt, damages or sum of money for which such prisoner was committed." This section contains in terms no exception whatever in favor of any cause of the prisoner's being thus at large. His going or being without the boundaries of the liberties, "shall be deemed an escape," and the sheriff shall be liable. Such is the plain reading of the section, and, if no exceptions are to be implied, but the language is to be held to apply to any and every going or being thus at large, whether voluntary or involuntary on the part of the prisoner or the sheriff, this action must be regarded as well brought, and the plaintiff entitled to recover, without reference to the question of the authority of the speaker's warrant, and of the officer by whom the prisoner in question was taken without the boundaries of the jail liberties in this case, and upon which this action is founded. Section 61 of the same article of the Revised Statutes provides, that all persons committed to any jail, upon any process, for contempt, or committed for misconduct, in the cases prescribed by law, shall be actually confined and detained within the jail until they shall be discharged by due course of law. It then provides that if any sheriff or keeper of a jail shall permit or suffer "*any prisoner so committed*" to such jail to go or be at large out of his prison, "except by virtue of some writ of *habeas corpus* or rule of court, or in such other cases as may be provided by law," shall be liable to the party aggrieved for his damages sustained thereby. The exception here prescribed does not, it will be seen, embrace the case of a person committed, as was the prisoner in question, upon execution, and duly admitted to the liberties of the jail, but is expressly limited to the case of "*prisoners so committed*," i. e., upon process for contempts or for misconduct. But although the exception specified in section 61 does not by its terms or intention reach the case of the prisoner in question, it furnishes, I think, an unmistakable key to the true reading and interpretation of section 63, and shows that the going or being without the liberties of the jail, provided for by that section, which was to be deemed an escape, was by the act, and upon

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the volition of the prisoner and not upon the compulsion of of judicial process.

The object plainly was not to favor sheriffs holding prisoners of this class committed for contempts and misconduct in reference to escapes, but to place them upon the same legal footing in regard to escapes from the jail by such prisoners as that in which they stood in respect to escapes by prisoners committed on execution in a civil action. If the prisoner is without the liberties by virtue of a valid legal process, which affords a complete justification to the officer having him thus without, in charge, it is not deemed an escape, and no action lies against the sheriff. The general rule at common law seems to have been, that nothing but the act of God or the king's enemies would excuse the sheriff for an escape from prison by a prisoner committed on execution. This was declared to be the rule by Lord LOUGHBOROUGH, in *Alsept v. Eyles*, 2 *H. Blackst.* 108, 113.

If the jail took fire, and the prisoners by means thereof escaped, the sheriff was excused if the fire was the act of God. *Bac. Abr.* tit. Escape in Civil Cases, H. And in Southcote's case, 4 *Co.* 84, it is laid down as the rule that "if traitors break a prison, it shall not discharge the jailor; otherwise if the king's enemies of another kingdom; for in the one case he may have his remedy and recompense, and in the other case not." The reason here given why the jailor should not be liable in case the prison was broken by the king's enemies of another kingdom, shows the cogency and soundness of the exception to the general rule of the common law, which I regard as well established in favor of sheriffs, where the prisoner is without the prison, or jail liberties, by virtue of some order of a court or officer of competent jurisdiction, or of some legal process which affords a justification to the officer executing it, and against whom the sheriff can have no "remedy and recompense." It has long been settled, both here and in England, that taking a prisoner, who was imprisoned on execution in a civil suit, away from the prison or the jail liberties on a *habeas corpus ad testificandum*, to testify, was no escape. *Noble v. Smith*, 5 *Johns.* 357; *Hassam v. Griffin*, 18 *Id.* 48; *Wattles v. Marsh*, 5 *Cow.* 176; *Martin v. Wood*, 7 *Wend.* 132; 3 *Esp. Cas.*



283; 3 *Burr.* 1440; 4 *East*, 587. And so when the prisoner has been discharged from his imprisonment, by the order of a court or judicial officer, it has been held a good defense for the sheriff, in an action for the escape, provided the court or officer making the order had jurisdiction to make it, even though such order was erroneously made, and might be avoided. *Cantillon v. Graves*, 8 *Johns.* 472; *Hart v. Dubois*, 20 *Wend.* 236. Otherwise, however, where the order is void upon its face, or is granted by an officer who has no jurisdiction in the matter. *Bush v. Pettibone*, 4 *N. Y.* 300; *Cable v. Cooper*, 15 *Johns.* 152. In *Field v. Jones*, 9 *East*, 151, the prisoner had signed his petition for the benefit of the day-rule, but left the king's bench prison before the sitting of the court on the day on which the rule was granted. The rule was granted in his favor upon the sitting of the court on that day, but not until after the action for the escape was commenced against the marshal. But the rule was held to cover the entire day when granted, and to be a justification to the marshal in the action. It is clearly enough to justify the sheriff to show that the absence of the prisoner is in pursuance of lawful authority.

To constitute an escape, there must be some agency of the prisoner employed, or some wrongful act by another against whom the law gives a remedy. *Allen on Sheriffs*, 231; *Barter v. Taber*, 4 *Mass.* 367; *Cargill v. Taylor*, 10 *Id.* 206. Whenever the principal, by the act of God or of the law, is taken out of the bail's keeping, as it were, before the day of surrender and without fault in the bail, they are discharged. 5 *Dane Abr.* 290; *Way v. Wright*, 5 *Metc.* 380; *Fuller v. Davis*, 1 *Gray*, 612. And it has been held, that a person privileged from arrest may leave the jail without the sheriff being liable for an escape. *Ray v. Hogeboom*, 11 *Johns.* 433. And so, where he has been released by act of the legislature. *Mason v. Haile*, 12 *Wheat.* 370. These cases, and many more which might be cited, show clearly, that the act of the law, as well as the act of God, or of the public enemies, will excuse a sheriff in an action for an escape; and that absence from the jail, or the jail liberties, by such means or from such causes, by the prisoner, are not within the contemplation of the statute, and are not the going or being at large, referred to in section 63.

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The question then arises, whether the prisoner in this case was removed from the jail liberties to Washington, by authority of law or legal process. This authority must, I apprehend, be paramount to that under which the person so removed is held, in order to justify the removal, or, at all events, of such a nature that the officer or person effecting the removal could justify under it in case of an action brought against him by the sheriff for taking his prisoner out of his custody. Any extended examination of the question of the general power of the house of representatives of the United States Congress to subpoena witnesses to testify before it, or before one of its committees, and to compel their attendance from any portion of the territorial limits of the United States, is rendered unnecessary in this case by the full and unreserved concession of the learned counsel for the plaintiff, of the existence of such a power in that body. That the power exists, there admits of no doubt whatever. It is a necessary incident to the sovereign power of making laws; and its exercise is often indispensable to the great end of enlightened, judicious and wholesome legislation. The power is rather judicial in its nature, but in a legislative body exists as an auxiliary to the legislative power only. In the earlier history of the country, from which our institutions both of law and legislation are principally derived, judicial and legislative functions existed in and were exercised by the same body. And when they were afterward separated, and each came to be exercised by a separate tribunal or body, the legislative body necessarily retained a sufficient amount of the judicial power, to enable it to investigate fully and to comprehend thoroughly any and every subject upon which the body proposed to act in its legislative capacity. This included the power to subpoena witnesses to give evidence, to compel them to attend and testify, and to punish for disobedience and contempt in refusing to attend, or in refusing to testify upon attendance. The power to punish for disobedience and contempt is a necessary incident to the power to require and compel attendance. This is not denied by the plaintiff's counsel. He contends, however, that the only way in which the attendance of Williamson before the house of representatives could have been lawfully enforced and secured, was by *habeas corpus* to testify, or to answer for the

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contempt. This is unquestionably the mode provided by law, where a witness imprisoned on civil execution is required to give evidence before a court, or to answer there for a contempt. Our statute, 2 *R. S.* 559, sections 1 to 5, inclusive, provides for such cases, where the person is brought up on such process, either to testify or to answer for a contempt. The prisoner is to be remanded after having testified, and if any order of commitment is made against him, it must be to the prison from which he was taken. *People v. Rogers*, 2 *Paige*, 103.

The statute, however, only relates to actions and proceedings in courts, and not to proceedings before legislative bodies. In regard to those bodies, if their practice is not regulated by any statute, they are to proceed according to their customary rules and practice. It is not denied in this case, that Williamson, the prisoner, was taken before the house of representatives on the occasion in question, upon the regular and customary process used by that body to bring prisoners to its bar, who had refused to obey the subpoena to appear and testify, and had been adjudged in contempt, for which they are required to answer. The warrant issued, gave the sergeant-at-arms the right to take the person of Williamson into his custody, and convey him to Washington, to answer and purge his contempt, if he could. It can not be denied, I think, that while he was thus in the custody of the sergeant-at-arms, under this warrant, and while he was before the house, until his discharge, he was in the custody of the law. The question then arises, whether he was at large during this time, within the meaning and intention of the statute, so as to constitute an escape. I am clearly of opinion that he was not. He was without the jail and the jail liberties, it is true, but he was still in the custody of the law, and was absent for a cause or purpose for which the policy of the law allows prisoners to be absent temporarily, provided they are still in the custody of the law. It was no more an escape than it would have been had the prisoner been without the liberties on *habeas corpus*. The law allows a creditor, in certain cases, to confine the person of his debtor within the jail, or the jail liberties, in order to coerce him into paying the debts. But it does not allow him to continue that confinement at the particular place, to the obstruction of the due

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course of justice in other cases. He may be taken to other places to give evidence, or to answer for his contempt; and so long as he is kept for this purpose by judicial process, and is not given his liberty to go as he will, it is no escape. The prisoner in question was taken to Washington for a legitimate object. He must be deemed to have been a material witness before the house of representatives, and that body had power to compel his attendance, and to punish him as for a contempt, in case of his neglect or refusal to attend and testify. They had jurisdiction in the premises, and issued their customary warrant. The prisoner was arrested, and taken away and detained under it. The plaintiff's counsel concedes that the prisoner might have been lawfully taken on a *habeas corpus*, but insists that, inasmuch as he was taken on a different process, though for a legitimate purpose, he was unlawfully without the limits as respects the plaintiff. But it is clear that the prisoner himself could not resist the sergeant-at-arms with his warrant. He was obliged to go in the custody of that officer. True, he might purge or excuse the alleged contempt, by showing that he was imprisoned, and could not obey the subpoena, and by giving his testimony according to the requirements of the first process, but he could not refuse to attend according to the exigency of the warrant. Nor do I think the sheriff could have resisted the taking. The prisoner was out upon the liberties, upon bail, and not otherwise in the sheriff's custody. And suppose the sheriff had sued the sergeant-at-arms for taking the prisoner from the jail liberties, I do not see how he could have recovered. That officer could, I assume, have justified under his process. It is to be presumed that it was fair on its face, and was issued by a body having jurisdiction, and for a lawful object, even against one imprisoned.

It seems to me clear, therefore, that Williamson, the prisoner, was taken by authority of law, and in a manner which gave the sheriff no remedy or recompense against the officer taking him. It is of no consequence, as it seems to me, that the warrant was not in the form of a *habeas corpus*. That is strictly a judicial writ. It is not a process which the body requiring the testimony of the witness could issue. Its process is the

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subpoena and the warrant, which were issued. It issued the only process it had or could issue. The house might perhaps in some form have applied to some court of competent jurisdiction, if one could be found, for a writ of *habeas corpus*, to bring the witness before it to testify or to answer for a contempt, though I think, under our complex system, some serious difficulties might have been found in the way of obtaining any such process. That seems to be the practice in England, where persons imprisoned on civil process are required as witnesses to testify before the house of commons or its committees. But there it seems to be a matter of practice, as in the matter of Sir Edward Price, a prisoner, 4 *East*. 587, who was confined in Ilchester jail by virtue of a commitment of the court of king's bench, for non-payment of a fine imposed as part of the judgment in a case of assault and battery. The prisoner was a material witness upon a question before the house of commons, and the speaker had issued his warrant to bring up the witness by the day appointed. But in order to obviate any difficulty which the jailor might make to suffer the prisoner to go out of confinement without the authority of the court, application was made to the court for a *habeas corpus ad testificandum*, to bring up the prisoner before the committee of the house. The court at first entertained doubts of the propriety of such an application, of which they did not recollect any precedent, but, after some hesitation, granted the rule to show cause, and afterward, upon the applicant undertaking to be at the expense of bringing the witness up and returning him to custody, made the rule absolute.

This is understood to be the practice now in Great Britain, in cases where witnesses are required before either house of parliament who are imprisoned. But the application in that case seems to have been made for more abundant caution and to avoid all difficulty with the jailor, and not for want of power in the house of commons to bring the witness up under its warrant. It is obvious that there is far less difficulty in such a practice in England than in this country, with its national and State legislatures and courts exercising separate and distinct jurisdiction. No such practice has ever, that I am aware of, been adopted in this country, and I do not regard it as a

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vital question in the case. If it is a mere question of practice, as I think it is, it in no respect affects the jurisdiction of the house of representatives. If that body had the right to have the prisoner before it temporarily for such a purpose, that is enough, and the mere form of the process upon which he was taken is not material, provided the object appeared substantially upon its face and it was issued by competent authority. *Whattles v. Marsh, supra.*

In the view I take of this case, it is not necessary to decide whether the Congress of the United States possesses certain powers superior to State laws, by which it can override such laws, or deprive creditors of rights secured by them; I do not suppose that Congress has any such right, which it can exercise arbitrarily or capriciously, or in any way, except in the exercise of some power expressly granted by the Constitution of the United States, or of some power which belongs, as a necessary incident, to a clearly granted power. It is enough, however, for this case, to hold that either house of Congress has, at least, as much right to have an imprisoned witness before it, for the purpose of giving evidence when deemed necessary, as any party can have in an action in a court of justice, and that creditors hold their imprisoned debtors subject to the right of temporary removal, for the purpose of testifying in the one case as much as in the other. I do not think a witness thus in execution could be allowed, on a mere subpoena, to leave the jail, or the jail liberties, for the purpose of giving evidence at some other place, without rendering the sheriff liable for any escape, for the plain reason that a witness out in pursuance of such a process would clearly be at large, within the meaning of the statute, not being in the custody of any officer, or of the law. The subpoena does not authorize any one to take the witness into custody, or to detain him for any purpose, and, of course, he would be at large without restraint. But not so when taken upon a *habeas corpus* to testify, or, by virtue of an attachment or a warrant, to answer for an alleged contempt. He is in the custody of the law, when held for such a purpose, until regularly discharged, and is not at large in that sense which is necessary to constitute an escape. Here the action was commenced while the prisoner was in custody under the

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speaker's warrant, and several days before he was discharged. Neither the sheriff nor his bail could have retaken him while thus held in custody, and the sheriff, most clearly, was in no respect to blame for the prisoner's absence from the jail liberties. He could not help it.

The action was, therefore, commenced before there was any escape, and while the prisoner was in the custody of the law, for a perfectly legitimate purpose. Having been commenced before any cause of action had accrued, the action can not be maintained. It is in no respect material to the case whether Williamson, the prisoner, had been guilty of a contempt, or, in other words, whether he had a valid excuse for not obeying the mandate of the subpoena. It is enough that he was charged with a contempt, and was taken into the custody of the officer of the body making the charge, on a regular process, which compelled him to appear and answer the charge. The judgment of the house on the question of contempt can not be examined or reviewed here. It does not distinctly appear from the facts found, when Williamson was released from the custody of the sergeant-at-arms, whether at Washington, or in New York, nor is it material, as the fact is found, that he was not released until February 9—four days after the action had been commenced. It appears that Williamson did, in fact, as soon as he was released, return to the liberties of said jail. The question whether the release of Williamson at Washington, and his voluntary return without restraint or compulsion to New York would have constituted an escape, is not presented by the facts found, and it is unnecessary to pass upon it. An escape after the action was commenced would not save it if there was no cause of action at the time of its commencement. I am of the opinion, therefore, that the judgment is right and should be affirmed.

All the judges present concurred.

Judgment affirmed, with costs.

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WILLIAMS v. BROWN

June, 1866.

The code of procedure has not altered the rule of 2 R. S. 354, § 18, subdivisions 7, 9, that a claim existing against the assignor, and in favor of the maker of a promissory note, which was assigned for value before it became due, although with notice of the offset, can not be set off against the note in the hands of the assignee.

William Williams sued William O. Brown, in the supreme court, on a promissory note dated June 20, 1851, for five hundred and eighty-four dollars and seventy-five cents, payable six months after date, to the order of the Merchants' Mutual Insurance Company, a corporation under the general act. Defendant being then president of the company, effected insurance with the company for marine risks, upon the cash or stock plan, and the note in suit he gave to the company for the premium thereon. On September 8, 1851, the company became indebted to the president in a sum in excess of the note, and being embarrassed by other debts, the directors made an arrangement with the plaintiff and others to discount drafts to be drawn by it, and authorized their secretary to assign to plaintiff securities as collateral for the payment of such drafts; and among securities thus assigned, and on the faith of which the drafts were made and discounted, was this premium note, which had not then matured. Before the note was indorsed by the secretary and delivered to plaintiff, defendant informed the plaintiff that the company were indebted to him, and claimed that the note ought to be charged to him on the books of the company.

The supreme court overruled the defense of set-off, and defendant appealed to this court.

HUNT, J. [after stating the facts.]—That the defendant's note is a valid claim against him, and that he is bound to pay it, is not disputed by him. His defense in this action arises upon a claim made by him against the insurance company,

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which he insists should be applied in satisfaction of the note in suit.

The right of set-off in this state is statutory. If the defendant's claim comes within the terms of the statute, he will succeed, and if it does not, he must fail. 2 R. S. 354, § 18.

The defendant's claim to a set-off meets the demand of the first six subdivisions of the section referred to. It is a demand arising upon contract, and is due to the defendant in his own right, and is for money paid or services rendered; it existed at the commencement of the suit then belonging to the defendant, and the plaintiff's action is one to which in its nature a set-off is applicable. Subdivision 7, however, requires that the demand proposed to be set off, must exist against the plaintiff in the action, unless the suit be brought in the name of a plaintiff who has no real interest in the contract upon which the suit is founded. In this respect the defendant fails to bring himself within the terms of the statute, his demand being against the insurance company, and not against the plaintiff, and the plaintiff having a substantial interest in the contract, and having the right to prosecute it in his own name. If the holder of the promissory note is legally in its possession, and is entitled to receive its payment, we have repeatedly held that he is the proper plaintiff in its prosecution, and this without reference to who may ultimately be entitled to a participation in its proceeds.* *Hunt v. O'Connor* and others, not reported; *Rose v. Black*, not reported.

Section 9 of the act in question provides that if the action be upon a negotiable promissory note, which has been assigned to the plaintiff after it becomes due, a set-off shall then be allowed, of a demand against the person assigning the same to the amount of the note. The action here was upon a negotiable promissory note, but it was assigned to the plaintiff before it became due, and the statute gives no right of set-off in such case. There is no other provision of the Revised Statutes, under which it can be claimed that a right of set-off exists.

* See *Fish v. Jacobsohn*, vol. 2, p. 132, of this series; *Allen v. Brown*, 44 N. Y. 228, affirming 51 Barb. 83.

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The defendant, however, invokes the aid of section 112 of the Code, and insists that he is entitled to the set-off by virtue of the last clause of that section. The previous section, 111, made an alteration in the manner of bringing suits, of great importance, by providing that "every action must be prosecuted in the name of the real party in interest." Before this enactment, the assignee of a bond or of any contract, except that of a bill of exchange or a promissory note, brought his action for its breach, not in his own name but in that of the original contracting party. To do justice in such cases in regard to resisting cross-demands, the legislature had provided, in the act regulating set-offs before quoted, and in section 10 thereof, that if the suit should be in the name of a plaintiff who had no real interest in the contract upon which the suit was founded, a demand existing against those for whose benefit the action was brought, might be set off, if the same might have been set off in an action brought by those beneficially interested.

When the Code enacted that every suit should be brought in the name of the party in interest, it became necessary to make a new provision to the effect that such transfer and such suit should not prejudice a set-off existing against the party assigning and before the assignment was made. It was to meet this precise contingency that section 112 was enacted; and accordingly, in *Beckwith v. Union Bank*, 9 N. Y. 211, it was held by this court, the first clause of the section meant that the assignment was to be without prejudice to any set-off which would have been available to the defendant had the action been brought to the name of the assignor. This construction was undoubtedly a sound one.

The second clause of the same section, 112, contains this addition: "But this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith and upon good consideration before due." This clause is restrictive, limiting the cases in which the right of set-off may exist, and conferring no authority in additional cases. It does not itself provide for a set-off in any case, but qualifies certain cases in which a set-off might be claimed under the first branch of the section.

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The defendant must find his right to set off his claim in a positive provision of the law, and not in a qualifying or restrictive clause.

I do not deem it important to decide whether the plaintiff received the note in suit by virtue of the assignment set forth in the case, together with the indorsement of the company's president upon the note, or whether he received it by the transfer of the president, simply, with the like indorsement. It was equally an assignment in either case, of a promissory note not then due, by the authority of the party owning, and with unlimited negotiability, and in either case gave the same rights to the holder thereof. The Revised Statutes, on the subject of set-off, and the Code, in the section quoted, used the word assignment, as equivalent to transfer or negotiation, and no argument can fairly be drawn from the use of this particular word in section 112 of the Code.

The judgment should be affirmed.

PECKHAM, J.—There is only one question in this case, and that is, whether the Code has altered the Revised Statutes as to a set-off under the facts here presented.

The note in suit was transferred to the plaintiff before due for a valuable consideration, but with notice that the defendant had a set-off against it. In each case the defendant could not avail himself of the set-off under the provisions of the Revised Statutes. 2 R. S. 354, § 18.

The Code provides, section 112: "In the case of an infringement of a thing in action, the action by the assignee shall be without prejudice to any set-off, or other defense existing at the time of or before notice of the assignment. But this section shall not apply to a negotiable promissory note or bill of exchange transferred in good faith and upon good consideration before due."

This section, it will be perceived, does not assume to declare what shall establish a transfer "in good faith."

A holder in good faith ordinarily means one who holds the note before due, for value advanced at the time of the transfer and without notice of any defense.

The notice in the case at bar under the law as it stood when

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the Code was enacted, was of a fact which constituted no defense to the note. How could the notice of such a fact affect the good faith of the transfer ?

If the legislature had intended to alter the law in this respect and make that a defense which before was none, I think we are bound to presume they would have used less equivocal language. See also, *Beckwith v. The Union Bank*, 9 *N. Y.* 211.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

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December, 1866.

It is not necessary that an order reversing an order made on special motion, founded on affidavits, should state that the reversal was on a question of fact. The provision of § 268 of the Code, that a reversal at general term shall not be deemed to have been on questions of fact unless so stated, does not apply to such orders.

James Hernon confessed a judgment to Joseph H. Williams for one thousand two hundred and forty-four dollars, in February, 1854. In April, 1861, William C. Barrett, a judgment creditor of defendant, moved to set aside that judgment as fraudulent, and for the insufficiency of the affidavit on which it was entered. The fraud alleged was, that there was no such debt due the plaintiff as stated ; that the defendant had been imposed upon in the confession ; that defendant was a butcher, doing business in New York city, and the plaintiff a drover, frequently selling cattle to him ; that the defendant also bought cattle of other drovers, and the plaintiff, like other drovers, was frequently in the habit of collecting the bills of other drovers from defendant when he visited the city, having previously advanced the amounts thereof to such other drovers ; that at the time plaintiff applied to defendant to confess this judgment, he stated to defendant that he was indebted to

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plaintiff in said sum of one thousand two hundred and forty-four dollars; that part of this sum was for cattle actually sold to defendant by plaintiff, but that a great part of said sum was, as he then stated, for moneys paid by plaintiff to other drovers to whom defendant was indebted; that said plaintiff stated that he had actually paid said bills, and requested defendant to confess judgment therefor; that defendant relied upon these statements, and, believing them, confessed and verified the amount, but that it was, in fact, untrue; that the very parties, whose bills plaintiff stated he had paid, have since applied to defendant for their payment, and denied ever having received their debts from the plaintiff; that one was Henry Hurd, and that he had since sued defendant and recovered judgment against him for some two hundred and fifty dollars, which latter sum is included in said judgment. This was the affidavit of the defendant himself, and he added, that he was unable to give the amount, and names of others whose debts were so included, and were still unpaid, as no others have sued him.

In answer, the plaintiff made affidavit, that the confession of judgment was for a balance due for seventy head of cattle sold defendant in 1853, and he annexes a copy of his account against the defendant, showing the amount of sales at three thousand three hundred and forty dollars, and the balance due after allowing the credits to be one thousand two hundred and forty-four dollars—the amount of the judgment. He swore the account “is in all respects true, and that that sum was justly due and owing to the plaintiff for cattle sold to defendant; that it is wholly untrue that any part of said amount was due to any other person.”

He admitted the custom of collecting bills for other drovers, but stated that most of the cattle sold defendant were plaintiff's, and, if any of them belonged to others, he first paid the owners the amounts thereof before they were entered in plaintiff's books.

He particularly denied that any money due to Henry Hurd was included in said judgment. He said he paid to Hurd one hundred and seventy-seven dollars for three cattle sold to defendant on October 10, 1853, by said Hurd; that he undertook to collect the bill, but did not guarantee it, and, failing to col-

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lect, he received the money back from Hurd, and that said bill was not included in said judgment. The items of the account and of the payments were given in an annexed copy. He denied all fraud. He said nothing as to the conversation sworn to by the defendant.

The supreme court at special term, denied the motion ; but, on appeal, the general term reversed the order, and granted the motion. Plaintiff appealed.

Thomas S. Moore, for plaintiff, appellant.

W. C. Barrett, respondent, in person ;—relied on *Code*, § 268, subd. 2.

BY THE COURT.—PECKHAM, J.—I incline to think that the facts on which the motion was based were substantially met and denied by the plaintiff. The particular allegation of fraud as to the demand of Hurd was particularly denied, and the other general allegations, as to persons not remembered, are also denied. The force of the defendant's affidavit is considerably diminished by his first affidavit verifying the judgment, where he swears, not on information and belief, but positively, that the amount of the judgment is due the plaintiff. Under such circumstances, where his affidavit, made more than seven years after the entry of the judgment, impeaching that judgment, is substantially denied by the plaintiff, I can see no reason for departing from the ordinary rule, that the party asking for relief must make out his case by a preponderance of proof ; a balanced case is not enough. There was, then, no ground of fact for setting aside this judgment. It is conceded, and is clearly true, that the statement of facts, out of which the debt arose, is sufficient, and the judgment entirely legal in form. The judge at special term was, therefore, right in denying the motion to set it aside, and the general term, I think, erred in reversing that order.

The appellant insists that the general term reversed the order upon a question of law, on the insufficiency of the statement. The respondent insists that their action was based on—

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tirely on the facts, and concedes that there was no question of law in the case. No opinion was delivered by either court. The provision of the Code of Procedure, that a judgment reversed at a general term "shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal," section 268, amended by 2d paragraph, does not apply to orders made on special motion upon affidavits. The respondent was, therefore, at liberty to insist that the order was made upon a question of fact. But we think there were no facts to warrant the order. The order of the general term is, therefore, reversed, and that of the special term is affirmed, with costs.

All the judges concurred, except PORTER, J., not voting.

Order of general term reversed, and order of special term affirmed, with costs.

WILMOT v. RICHARDSON.

June, 1866.

Affirming 7 Boreo. 570.

A seller of merchandise, with a lien for the price, who, with knowledge that the buyer has obtained advances upon a consignment of it to factors abroad, sues the buyer, on contract, for the price, thereby ratifies the sale, and can not afterward recover against the consignees in an action for money received.

John Wilmot, William Gooderham and others, sued Thomas Richardson and others, in the N. Y. superior court.

Plaintiffs composed the firm of J. Wilmot & Co., flour dealers. Defendants had a house in New York under the name of Thomas Richardson & Co., and one in Liverpool under that of Richardson, Spence & Co.

One Patterson arranged with defendants that on his purchasing flour and consigning it by them to their Liverpool house, they should make advances to him on the price.

The flour in question was purchased by Patterson, May

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5, on which day the bought and sold notes were delivered by the broker, McKean, to plaintiffs and to Patterson. On May 9, the defendants made advance to Patterson of seven dollars per barrel thereon, in the faith that it was his flour. It had been sold by plaintiff at seven dollars and ninety-three and three-quarter cents per barrel to Patterson. On May 11, the flour having been delivered on board the vessels for Liverpool, the plaintiffs delivered the ships' receipts therefor to McKean, as they were conditionally to be returned if he failed to get the money thereon from defendants. These were delivered by Patterson to the defendants on the twelfth, who then advanced to him six thousand six hundred and fifty-one $\frac{1}{10}$ dollars, but on account of other flour. On the thirteenth or fourteenth, the vessels, containing the flour, sailed for Liverpool.

On Tuesday, May 16, for the first time, Wilmot called on defendants as to this flour. On the 13th they had received of Patterson five thousand dollars upon it.

Negotiations then ensued, which resulted in plaintiffs receiving Patterson's order or draft on defendants for the net proceeds thereafter to accrue from his transactions with them, and this order was accepted by defendants by a written memorandum which also stated that they had written to their Liverpool house informing them thereof, and instructing them to hold all proceeds of sales subject to the order of defendants only.

The sum of two thousand eight hundred and eleven dollars and twenty-seven cents, proceeds of such sales was thereafter paid to Wilmot, who gave receipt as balance in full of proceeds of sales of flour as per your acceptance of Walter Patterson's order in our favor.

After the giving and acceptance of the order, but before the receipt of these proceeds, plaintiffs sued Patterson for the price of the flour.

The superior court held, that plaintiffs could not thereafter recover from defendants as upon a sale and delivery to them of the flour or as upon a conversion of it by them. Reported in 7 Bosw. 570, and see a previous decision in 6 Duer, 328.

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BY THE COURT.—PECKHAM, J.—It is entirely clear from the conceded facts that the defendants acted in entire good faith in the whole transaction: There is not a fact at war with this view. The same may be said of the plaintiffs. It is a question of mere law as to the rights of the parties.

The plaintiffs insist here, that they are entitled to recover the proceeds of the flour to the extent of their claim against Patterson for the balance of the purchase-money, as money had and received by the defendants to the plaintiffs' use; that the title to the flour vested in Patterson by the bought and sold notes before delivery of the ships' receipts and certainly by the delivery of the flour on the ships; that they still had a lien for the purchase-money which they never waived; and the flour having been sold by defendants, their action for money had and received lies against defendants. See *Terry v. Wheeler*, 25 N. Y. 520; *Kimberly v. Patchin*, 19 N. Y. 330, and cases cited; *Pars. Merc. L.* 42.

When the whole facts were known to the plaintiffs, that the ships had sailed with the flour and they were unpaid in about ten thousand dollars, it may be they had a right to affirm the sale and prosecute for the price, or they might have rescinded the sale and looked to the flour, notified the defendants that they claimed the flour, and wholly disaffirmed the sale.

There may have been considerable question whether they could, under the circumstances, disaffirm the sale. There is none whatever as to their authority and power to ratify it. They could not do both.

On May 20, three days after Wilmot's interview with the defendants and Patterson, the plaintiffs commenced a suit against Patterson, for this demand for goods sold and delivered. They obtained an attachment upon an affidavit of the plaintiff Wilmot, in which he swears that Patterson is indebted to the plaintiffs in over ten thousand dollars for this flour, sold and delivered to him on May 12. There is not one word of qualification or explanation of that suit or of that affidavit.

Was not the sale and delivery, then, fully ratified by that suit? I think it was. *Morris v. Rexford*, 13 N. Y. 552.

This, it will be observed, was directly after the whole matter was consummated. Whether the delivery was qualified or ab-

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solute—whether the sale was fraudulent or fair—the plaintiffs, by this affidavit and proceeding elected to hold it by an action, a consummated sale, an actual, absolute delivery.

The ships' receipts had been handed over by plaintiffs on May 12, and on the 13th, Patterson paid them on the flour, five thousand dollars.

Again, the plaintiffs deny that they received the order in their favor upon the defendants, drawn by Patterson, and declare they refused to receive it.

If they did, the conduct of the plaintiffs entirely differed with their declarations. Wilmot himself drew the latter portion of this order upon the defendants. The letter of acceptance from the defendants was received and retained by the plaintiffs, the money was paid to Wilmot upon that order, and so expressly received by him and receipted.

How can the declaration of Wilmot, that he positively refused to receive or have anything to do with that order, made on or before May 18, qualify his plain affirmative acts thereafter. He did, in fact, have something to do with the order. He received and retained the letter of acceptance thereof. He received, on two different occasions, in September, the money due thereon, and he receipted that money as received thereon.

The declarations, if made as claimed, were entirely idle and immaterial, in view of his subsequent conduct. The plaintiffs did, in fact, receive the order and its payment to the whole amount of the funds applicable thereto.

By this order in the plaintiffs' favor, the proceeds, in part, of this same flour, were appropriated to the plaintiffs. *They thus, in substance, affirmed or sanctioned its sale* in Liverpool by the defendants and ratified the sale to Patterson. *Bank of Beloit v. Beal*, 34 *N. Y.* 473; *Palmerton v. Huxford*, 4 *Den.* 166; *Masson v. Bovet*, 1 *Id.* 69.

There was in the evidence touching this ratification no disputed question of fact for the jury. Had the jury found against the ratification—against the plaintiffs' election to consider this a sale of the flour to Patterson, it would have been the clear duty of the court to set that verdict aside.

In such a case, as a general rule, the court may properly nonsuit the plaintiffs.

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The theory of the plaintiffs' counsel that the plaintiffs had the right to sue for goods bargained and sold to Patterson, though not delivered, that they might waive the tort of the fraudulent purchase, and thus, without ratifying the transaction to Patterson of a sale and delivery, is theory only, and not founded upon the facts of this case. The law of it need not be considered. They brought no suit for goods bargained and sold.

[Remarks as to unimportant exceptions are omitted.]

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

WILSON v. N. Y. CENTRAL R. R. CO.

June, 1867.

The defendants agreed with plaintiff (who had contracted to construct a railroad track parallel to that of defendants' road) that they would transport and distribute his material along the line, and charge him only the actual expense. In his action against them to recover for a breach of the agreement, *held*, that evidence of how much more it cost him to distribute the ties, &c., by laying a temporary track, was admissible; and this excess in expense was proper damages.

An objection that a witness's answer of a question is irrelevant, must be so expressed as to point to the particular answer, not to the whole of his testimony.

Samuel Wilson sued defendants for breach of contract. He was a contractor with the Buffalo, New York & Erie Railroad Company, to lay its track and superstructure from Attica to Batavia, a distance of eleven miles. By the contract, he was to receive the materials, iron, ties and spikes, from the company at Attica and Batavia, and himself distribute them for use, between the two places. Defendants' railroad ran between these places, parallel to and so near the new road that these materials could conveniently be distributed from defendants' cars at the places where plaintiff wanted them for use; and he contracted with defendants to do this work as stated below. After doing a small portion of the work of distributing, defendants refused to proceed; and plaintiff brought this action.

From judgment for plaintiff, defendants appealed.

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A. P. Laning, for defendants, appellants.

F. E. Cornwell, for plaintiff, respondent.

BY THE COURT.—J. M. PARKER, J. [After stating above facts.]—The referee found that plaintiff, in the month of May, 1858, made an agreement with the defendants, by which the said defendants agreed to furnish a locomotive engine and the necessary railroad cars and hands to transport for said plaintiff and deliver along the line of said road, between Batavia and Attica aforesaid, at such points as the said plaintiff should desire, all such railroad ties, spikes and other materials, as the said plaintiff should or might have for the construction of said railroad; and that said defendants would keep an account of the actual expense of transporting and distributing the same, the amount of which should be paid by the plaintiff to the defendants therefor." The defendants' counsel insists that this finding is without evidence to sustain it, in that there is no evidence that the defendants were to distribute the spikes. That the defendants undertook to distribute the ties is not disputed, and though nothing was said specifically about the spikes, the testimony of the plaintiff is that the defendants' agent, with whom the contract was made, said "he would put on an engine and train of cars and do my work for me." This, the referee construed, doubtless, and I think properly, as including the distributing of all the materials the plaintiff had for distribution over the whole route.

[After remarking that no other question than the following remained, the learned judge proceeded as follows.]—Upon the trial, after giving evidence tending to prove his contract with the defendants; the amount of work done by defendants upon it; the amount left undone, and defendants' refusal to do any more; the mode then adopted by plaintiff for distributing the residue of the materials, to wit: part by the use of teams, and part by making a partially completed track, and employing on it, upon hire, the engines and cars of the Buffalo, New York & Erie Railroad, for the purpose, this track being laid by placing the rails upon the few ties to the rail, already distributed, and which was subsequently completed by filling in the residue necessary,

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as they were thus drawn and distributed,—the plaintiff called as a witness, George D. Miller, his foreman in doing the work under his contract, who, after giving testimony further tending to prove the facts above referred to, said: “I think it would make one hundred dollars per mile difference to lay ties this way than to lay them before rail was laid.” At this point in the case, which was the close of Miller’s evidence on the direct examination, occurs this statement: “This evidence was objected to, before the same was given, as irrelevant and incompetent on the question of damages, but the referee decided that the same was competent for that purpose, to which the defendant duly excepted.”

The objection, in terms, is broad enough to include all the testimony which Miller had given. There is nothing to point the expression “this evidence” to the last sentence rather than to the whole, as there should have been if the last sentence alone was to be included in the objection; and, as some portions of Miller’s evidence is clearly unexceptionable, the objection, being too broad in that view, must go for nothing.

But, if the objection were confined to the sentence giving the comparative cost of laying the track before and after the rails were placed *in situ*, as described, I think this fact a proper one to prove; for it is the fact to which the objection points, and not the mode of proving it. This extra cost of laying the track was in effect but the extra cost of doing the work which the defendants were to do, for the track was thus partially laid as a part of the work necessary in transporting the ties; it was virtually laying down a temporary track on which to transport the materials, and after they were transported, taking it up again, and then, with the materials thus brought upon the ground, together with what was there before, and thus temporarily used, constructing the superstructure of the road. Thus viewed, this extra cost was strictly but the extra cost of distributing the materials; and if, in some instances, instead of taking up the rails for the purpose of placing the additional ties, the rails were suffered to remain, and the ties worked in under them, it does not change the character of the expense prejudicially to the defendant. It comes to the same thing in effect. The extra expense is the difference to the plaintiff between

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having the materials on the ground for use as the superstructure is laid and completed, and bringing the portion of them left behind by the defendants in the mode adopted by the plaintiff.

Indeed, regarding this extra expense as applicable exclusively to the cost of the superstructure, as the witness gave it, inasmuch as it was the direct and immediate result of the materials not being distributed as defendants undertook to distribute them, it is an injury for which the plaintiff was entitled to recover.

I am of the opinion the judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

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December, 1868.

An agent can not retain for himself, any of the profits or advantages of a contract made by him, except by the principal's consent, given with full knowledge of the facts.

The common law rule that the admission of incompetent evidence is ground for reversal unless it appears that the appellant could not have been injured by it,—applied.*

Admission of evidence, which in itself, is immaterial and, therefore, by the general rule, no ground for reversal becomes a ground of reversal, if subsequent testimony of the unsuccessful party, upon a material point is inconsistent with it, and it may have had weight in discrediting such testimony, and leading to the judgment appealed from.

Elisha R. Wilson sued Benjamin F. Wilson, to recover back money obtained by fraud. Plaintiff and defendant desired to purchase land which had been advertised for sale by Henry Van Rensselaer. Defendant called on plaintiff, and proposed that they purchase together, at private sale, previous to the advertised auction. He represented that he could buy cheaper than any one else. Each wanted a part of the land advertised, and defendant said he would buy the part plaintiff wanted for

* Compare however, *People v. Gonzalez*, 35 N. Y. 49.

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plaintiff, as cheap as he could, and would charge nothing for his services. Defendant afterwards reported to plaintiff that he had bought the fifty acres which plaintiff desired, at fifteen dollars per acre, at which rate plaintiff paid the defendant. In reality defendant had bought at ten dollars per acre, and had kept the difference in price.

Upon the trial a witness, a stranger to the transaction, was allowed to testify that defendant had told witness that he had paid Van Rensselaer fifteen dollars per acre. It did not appear that this statement was ever communicated by witness to plaintiff. Defendant was subsequently examined as witness in his own behalf, and contradicted this statement, and contradicted the charges of fraud, by denying his agency and claiming that he purchased of Van Rensselaer in his own right.

The supreme court, at general term, affirmed a judgment for the plaintiff, and defendant appealed.

GROVER J.—The referee found in favor of the plaintiff, upon the only material question of fact controverted upon the trial. That question was, whether the defendant agreed to purchase the lands in question of Van Rensselaer, as agent of and for the plaintiff, and received money from the plaintiff for that purpose, as claimed by the plaintiff, or whether the defendant himself agreed to sell such lands to the defendant for fifteen dollars per acre, and procure from Van Rensselaer a deed or contract for the same to the plaintiff for that price, as claimed by the defendant.

The testimony upon this question was conflicting, and the conclusion of the referee thereon can not be disturbed by this court. The legal conclusion drawn by the referee from the facts found was correct. If the defendant agreed to purchase the land as agent for the plaintiff, the former was bound to refund to the latter all the money he had received, except what he actually paid upon the purchase of the land. An agent is bound to exert his care and skill in making as good a bargain as practicable for his principal, and can not retain for himself any of the profits or advantages of a contract made by him, without the consent of the principal, given with a full knowledge of all the facts. *Dunk. Pal. Ag.* p. 32, following *Moore v. Moore*, 5 N. Y. 256.

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The judgment of the supreme court affirming the judgment of the referee was right, unless the referee erred in receiving or rejecting evidence, having a bearing upon the question of fact litigated by the parties. There was no dispute upon the trial as to the price paid by the defendant to Van Rensselaer for the land ; that was ten dollars per acre. The plaintiff was permitted to prove by a witness, that the defendant told her he paid fifteen dollars an acre therefor. This evidence was wholly immaterial upon any of the direct issues of fact litigated by the parties, and although erroneously admitted, could not have worked any injury to the defendant, and would therefore furnish no ground for the reversal of the judgment. But the defendant was introduced as a witness in his own behalf and gave material evidence in his own favor, which, if fully credited by the referee, must have induced a report in his favor upon the questions of fact. His credibility thus became a material issue, and any evidence erroneously received, tending to impair it, furnished ground for a valid exception. The evidence received in this case, did tend to destroy the credibility of the defendant as a witness. It tended to prove that he had told a falsehood as to the price paid for the land. This may have induced the referee to discredit his testimony ; as it appears from the report, he actually did discredit it. The evidence was not introduced to contradict any testimony given by the defendant upon the trial, as he had given no evidence in conflict with it. Its only possible effect was to prove that the defendant had told a falsehood to the witness as to the price paid by him for the land, there being no dispute upon the trial or issue upon the pleadings upon that question. The evidence was clearly incompetent, and we have seen that it may have produced injury to the defendant. The legal rule is, that where incompetent evidence is received, to which the proper exception is taken, the judgment must be reversed, unless it appears from the case that such evidence could not have injured the party. *Worrall v. Parmelee*, 1 N. Y. 519.

Applying this rule, the judgment must be reversed and a new trial ordered, costs to abide event.

All the other judges concurred, except CLERKE, J., who dis-

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sented on the ground that the testimony in question showed the *animus* of the defendant, and tended to show that testimony which plaintiff had given to the same effect was true.

Judgment reversed, and new trial ordered, costs to abide event.

WILTSIE v. EADDIE.

September, 1867.

An exception does not lie to the report of a referee, upon the ground that he has refused to find upon a question of fact other than the issues in the cause.*

This court can not review a decision of the court below, affirming the judgment of a referee, on a question of fact, unless he decided without evidence or against all evidence.†

* Compare *Van Slyke v. Hyatt*, 46 *N. Y.* 261; *Leffler v. Field*, 47 *Id.* 407; *Beck v. Sheldon*, 48 *Id.* 365; *Fabbri v. Kalbfleisch*, 52 *Id.* 23.

† In *STRATTON v. COMFIELD*, (December, 1865) it was *held*, that this court could not review the decision of a referee where the facts are not found, nor his legal conclusions stated. His statement that certain facts appeared in evidence, and his expression of his opinion on their legal effect, is not enough.

S. V. R. Cooper, for defendants, appellants.

Sidney S. Harris, for plaintiffs, respondents.

BY THE COURT.—WRIGHT, J.—This case is not in a condition to be reviewed in this court. The appeal is from a judgment entered in an action tried by a referee, and there are no findings of fact or of law. In *Otis v. Spencer*, 16 *N. Y.* 610, it was distinctly held that these must be contained in a case settled by the referee, and that this court could not look elsewhere for them; but here, neither in a case nor in the referee's reports are they specified. In the first of these the referee determines certain legal questions arising upon facts that he states appeared in evidence before him, without finding that the facts existed. In the second he reports the proceeding had on a subsequent accounting, having come to the conclusion that the defendant should account to the plaintiff, as trustee, under the will of their grandfather. An account is stated, but without the facts being found upon which the statement is predicated.

It is clear, therefore, as the appeal presents the cause, that there can be no review, in this court, of the judgment. We can not review the

Wiltzie v. Eaddie.

Thomas Wiltzie sued James and William R. Eadie, in the supreme court, alleging that he, the plaintiff, was engaged as a warehouseman, and forwarder on the Erie canal, in 1859; and that defendants employed him to receive at his warehouse, and ship therefrom to the city of New York, a quantity of potatoes, for which they promised to pay him a reasonable compensation. Defendants denied these allegations.

Conflicting evidence was given upon the question, whether the service was rendered by plaintiff, on his own account, or as administrator of one Butler, and in fulfillment of a contract between Butler and defendants. The referee found for plaintiff; and the court, at general term, affirmed the judgment on his report. Defendants appealed.

James L. Angle, for defendants, appellants.

W. C. Rowley, for plaintiff, respondent.

BY THE COURT.—HUNT, J.—After hearing the testimony produced by the parties, the referee found, as matter of fact, that at the time the potatoes were shipped, the plaintiff was himself engaged in the business of warehouseman and forwarder; that he received and shipped from the warehouse occupied by him, and for the defendants, thirteen thousand one hundred and

decision of a referee where the facts are not found, nor his legal conclusions, unless stated and properly excepted to. An extraordinary course was pursued on the trial, in stopping midway to take the opinion of the referee on the legal aspects of the case, and subsequently stating an account as upon a reference for that special purpose; but, notwithstanding this, there would have been no difficulty in having a review of the decision here. Within the time allowed by the Code, a case should have been made and settled by the referee, containing his conclusions of fact and of law, with a proper statement of the questions presented, and the exceptions taken to his rulings on points of law. But nothing of this kind was done; the defendants' counsel contenting himself with excepting to the legal views of the referee, upon a state of facts not found by him. As the case is presented by the record we can do nothing else than affirm the judgment.

All the judges concurred.

Judgment affirmed.

twenty-seven bushels, and two thousand six hundred and twenty-five barrels of potatoes.

He found the value of the service, and made his report for the amount due to the plaintiff from the defendants upon this theory of the facts.

The defendants ask a reversal of the judgment, on the ground that the referee refused to find specifically upon the question, whether the plaintiff, before he received and shipped the potatoes in question, had information of the existence of a contract between one Butler, then deceased, and the defendants, for receiving and shipping the same potatoes. The question was sharply litigated before the referee, whether the plaintiff received and shipped the potatoes in question, acting as the administrator of Mr. Butler, or whether it was his individual transaction.

The question was pertinent, inasmuch as the defendants claimed to have paid Butler, in full, for the same service for which the plaintiff sought compensation in this action. As a fact in a chain of evidence against the plaintiff, the testimony embraced in the question upon which the referee was then asked to find, was obviously material. No complaint is made of the exclusion of evidence, as it was all received and considered by the referee.

The complaint that the referee has not found specifically upon the question suggested, is not well taken, and for two reasons: First, the referee is required to find and report upon the issues only, and not upon the evidence. *Code of Pra.* § 272. He must "state the facts found by him." Thus, he was bound to determine and report upon the question, whether the parties in this action entered into the contract set forth in the complaint. That was the precise issue before him. But he was not bound to say whether he believed the statements of a particular witness, or what his decision would have been if he had believed him, or disbelieved him. He was not bound to "state" whether a particular link in the chain of the evidence of either party existed or was wanting. Such is the character of the complaint now under consideration. As an independent question, it was not of the least importance whether the plaintiff was aware that a contract for the shipment of

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potatoes existed between the defendants and the deceased. It was only important as bearing upon the question in issue, viz : whether a contract existed between the parties to the action, as set forth in the complaint. The referee has found, distinctly, upon that point, that such a contract did exist. That was, itself, a question of fact ; and he further found that the service sued for was not rendered in fulfillment of Butler's contract. He is not called upon to find or explain the means and processes by which he arrived at that conclusion. When the referee decided and "stated" that the contract was made between the parties to this action and the service rendered was in fulfillment of that contract, he decided and "stated" all that was necessary on that branch of the case.

But again : The question referred to the referee for his decision was a question of fact, and can only come before this court for its consideration, when the judgment of the referee has been reversed on a question of fact, and the order of reversal so certifies. *Code of Pro.* § 272. In the present case, the judgment of the referee was affirmed.

If the point of fact which, it is complained, was not decided, had been upon the main issue, it would not have been within our power to review it.

Under such circumstances, we can only review the decision of the general term, when the referee decided without any evidence, or against all the evidence on the point. In the present case, the plaintiff expressly denied any knowledge of a contract between the defendants and the deceased, except as to the potatoes raised on Bullen farm.

Each of these reasons is conclusive against the appellants' claim ; and they furnish an answer to the other points of the appellants, to wit : that the referee declined to report whether both parties supposed that Wiltzie was acting in behalf of the estate, and also in relation to the receipt of the seven hundred dollars, and the application of the same ; and also as to what took place on the settlement of the accounts of the plaintiff and administrator of Mr. Butler.

These are questions of fact, and questions of evidence simply. The referee found that a contract was made between the parties to this action, by the service which was rendered by the

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plaintiff for the defendants, and which service was rendered by him in his individual capacity, and not as administrator. He properly held that the law implied a promise, from these facts, that the defendants would pay to the plaintiff the value of the service rendered.

The judgment should be affirmed.

All the judges concurred.

Judgment affirmed, with costs.

WITHERHEAD v. ALLEN.

September, 1867.

Reversing 28 Barb. 661.

The liability of individual members of a joint-stock company, after judgment and execution unsatisfied against the company, under *L. 1849, ch. 258, § 1*, as amended by *L. 1853, ch. 153*, is that of partners, and consists in the original demand against the company, not the judgment against it.*

The complaint therefore must allege a subsisting cause of action against the company, on the original demand. Alleging that the company became indebted to plaintiff for goods sold, without alleging a sum *now due*, or a breach in any form, is not enough, even where judgment and execution unsatisfied is alleged.

George Witherhead sued Elijah B. Allen and nine others in the supreme court to charge them as members of a joint-stock company.

The action was commenced under the statute of 1849, entitled "An act in relation to suits by and against joint-stock companies and associations," as amended in 1853, against the appellants and seven other persons, alleged to be members of a joint-stock association, after judgment and execution against the company.

By section 1 of that act, "any joint-stock company or associa-

* Compare *Miller v. White*, 50 *N. Y.* 137; rev'g 10 *Abb. Pr. N. S.* 385; *S. C.*, 59 *Barb.* 434. *Conklin v. Furman*, 43 *N. Y.* 527; aff'g 57 *Barb.* 484; *S. C.*, 8 *Abb. Pr. N. S.* 161. *Hall v. Sigel*, 13 *Abb. Pr. N. S.* 135.

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tion consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association; and all suits and proceedings so prosecuted by or against such joint-stock company or association, and the service of all process or papers in such suits and proceedings on the president or treasurer for the time being of such joint-stock company or association, shall have the same force and effect as regards the joint rights, property, and effects of such joint-stock company or association, as if such suits and proceedings were prosecuted in the names of all the shareholders or associates, in the manner now provided by law." L. 1849, ch. 258, § 1.

Section 4, as amended in 1853, enacts as follows: "Suits against any such joint-stock company or association in the *first instance shall be prosecuted* in the manner provided in the first section of the said act; but after judgment shall be obtained against any such joint-stock company or association as above provided, and execution thereon shall be returned unsatisfied in whole or in part, suits may be brought against any or all of the shareholders or associates, individually, as now provided by law." L. 1853, ch. 153.

The allegations of the complaint, omitting numbers and details, were as follows:

That the defendants were, during the year 1857, members of and shareholders in a joint-stock company or association, duly organized and styled and known as "The Ontario & St. Lawrence Steamboat Company." That during 1857, and while the defendants were members thereof, the company became indebted to the plaintiff for goods sold and delivered to its officers and agents, for its use and benefit in the sum of, &c. That on a day named he commenced an action against the company, on the said demand, in the supreme court, by the service of a summons and complaint on its president, and on, &c., obtained a judgment for a specified sum, damages, and another specified sum, costs. Which was docketed, &c.

That on the same day an execution upon such judgment was issued and delivered to the sheriff of St. Lawrence county, requiring him, &c. That said execution has been returned wholly unsatisfied and the judgment remains wholly unpaid.

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Wherefore plaintiff in this action demanded judgment against defendants for the amount of the judgment against the company, with interest.

Defendants demurred, that the complaint did not state facts sufficient to constitute a cause of action.

Judgment against defendants upon the demurrer as frivolous was granted at chambers, and final judgment was thereupon entered.

The supreme court, on appeal from the decision, held that the complaint was good, and contained all the facts necessary for a cause of action against the defendants; and, whether the shareholders were individually liable for the costs of the judgment against the company or not, the demurrer was frivolous. The court, however, were of opinion that their liability was on the judgment which merged the original demand; and therefore, they were liable for the costs. The court, accordingly affirmed the judgment. Reported in 28 *Barb.* 661.

Defendants appealed.

Myers & Westbrook, for defendants, appellants;—Cited *Western R. R. v. Kortright*, 10 *How. Pr.* 457; *S. C.*, 5 *Abb. Pr.* 30; 28 *Barb.* 661; *King v. Stafford*, 5 *Id.* 30; *Code*, § 246, subd. 2; §§ 269, 348; *Bailey v. Banker*, 3 *Hill*, 188, 192; *Statutes*, 1849, 1853; *Chitty Pl.* 43; *D. R. Church v. Wood*, 8 *Barb.* 42; *Rayner v. Clark*, 7 *Id.* 581; *L.* 1853, p. 283; *Moss v. Rossie Lead Mining Co. and Moss v. McCullough*, 5 *Hill*, 131, 137; *Cullough*, 2 *Den.* 119; *Moss v. Oakley*, 2 *Hill*, 265; *Allen v. Harger v. McSewall*, 2 *Wend.* 327; *Van Santvoord's Pl.* 730; *Neefus v. Kloppenburgh*, 2 *Code*, 76; *Nichols v. Jones*, 6 *How. Pr.* 358; *Rayner v. Clark*, 7 *Barb.* 581.

Magone & Partridge, attorneys for plaintiff, respondent;—Cited *Code*, § 247; § 136, subd. 3; *Witherspoon v. Van Dolar*, 15 *How. Pr.* 266; *Fales v. Hicks*, 12 *Id.* 153; *Marquisee v. Brigham*, *Id.* 399; *Shearman v. N. Y. Central Mills*, 1 *Abb. Pr.* 187; *Bank of Lowville v. Edwards*, 11 *How. Pr.* 216; *Appleby v. Elkins*, 2 *Sandf.* 672; *Brown v. Ward*, 3 *Duer*,

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660; *Harrington v. Hingham*, 15 *Barb.* 524; *Parker v. Jackson*, 16 *Id.* 33; *Merrifield v. Cooley*, 4 *How. Pr.* 272; *Catlin v. Billings*, 16 *N. Y.* 622; *Ingersoll v. Bostwick*, 22 *Id.* 423; *L.* 1849, c. 258, § 1; 1853, c. 153, § 4; *Slee v. Bloom*, 20 *Johns.* 669; *Moss v. Oakley*, 2 *Hill*, 265; *Moss v. McCullough*, 7 *Barb.* 279, 5 *Hill*, 131; *Strong v. Wheaton*, 38 *Barb.* 616; *Allen v. Sewall*, 2 *Wend.* 327; *Harger v. McCullough*, 2 *Den.* 119; *Corning v. McCullough*, 1 *N. Y. (1 Comst.)* 47; *Griswold v. Loverty*, 12 *N. Y. Leg. Obs.* 316; *S. C.*, 3 *Duer*, 690; *Wesley v. Bennett*, 5 *Abb. Pr.* 493; 6 *Duer*, 688; *People v. Mayor, &c. of N. Y.*, 8 *Abb. Pr.* 19; *Lord v. Vreeland*, 24 *How. Pr.* 316; *S. C.*, 15 *Abb. Pr.* 122, aff'g 13 *Abb. Pr.* 195.

BY THE COURT.—J. M. PARKER, J. [After stating the facts.]—The question brought here by the appeal is upon the issue of law raised by the demurrer: Does the complaint state facts sufficient to constitute a cause of action? *Manning v. Tyler*, 21 *N. Y.* 567; *Id.* 502; *East River Bank v. Rogers*, 7 *Bosw.* 493.

[The learned judge then recited the statutes above quoted.]—The joint-stock companies mentioned in these acts, are not corporations, but mere partnership concerns, in which the shareholders are partners, and all individually liable as such. These statutes, however, modify the common law in its application to them: First, in respect to the mode of suing the company, and the effect of judgments against it thus obtained, reaching the joint property of the association only: Second, in suspending the right to sue the parties individually for the liabilities of the company, until redress has been thus sought against the property of the association and has failed: Third, in allowing actions after such failure, against any or all of the individual partners, in the language of the act, “as now provided by law,” that is, such actions as might have been brought, if the act in question had not been passed.

It seems to me that we can not, from these enactments, infer the intent to authorize actions against the individual partners upon the judgments so to be obtained against the association. No action can be brought against the individual partners upon any demand against the company, until one has been first brought

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against the company *upon the same demand*, is the clear declaration of the statute. The cause of action, therefore, on which the individual partners are to be sued, is the same as that on which the association was sued. The judgment against the association is not a judgment against the individuals, either in form or effect. It is a statutory judgment, and the statute declares what its effect shall be, that is, as regards the joint rights, property and effects of the joint-stock company, the same as though it were a judgment obtained in an action brought against the company in the ordinary way. As against the individual partners it has no force as a judgment, beyond the effect given it by the statute, and is not a substantive cause of action against them. *Bailey v. Bancker*, 3 *Hill*, 188, 192.

In bringing an action, then, against the individual partners, the complaint should set forth such facts as are sufficient to show the original cause of action against the association, in addition to those made necessary by the act, showing the attempt and failure to collect the demand by judgment and execution out of the property of the association.

In the case at bar, it would seem that the pleader proceeded upon the idea that a recovery was to be had upon the judgment against the association, and his demand for judgment is for the amount of that judgment, damages and costs. The defendants' counsel claims that the complaint being upon the judgment, the action can not be sustained.

If the pleader in setting forth his cause of action does in fact show a good cause of action, although not the one intended, his pleading will nevertheless be sustained upon demurrer, for it is to be measured, not by his view of the law, but by the law itself. We must look, then, into the complaint to ascertain whether it sets forth, by proper allegations, a cause of action independent of the judgment against the association.

It shows the defendants, members of the association, and, besides the proceedings to judgment against the association, and the return of the execution unsatisfied, alleges that during the time when they were such members thereof, "The said company became indebted to the plaintiff for goods sold and delivered to its officers and agents for its use and benefit, in the sum of one hundred and sixty-two dollars and fifty-one

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cents." This is the whole statement of facts. Do they constitute a cause of action?

I confess I am quite unable to see a cause of action in the statement. The fact that the company, in 1857, became indebted to the plaintiff in a sum named, for goods sold and delivered to its officers and agents for its use, does not make out a present right of action against the company, without the further fact of a present duty and a breach of it. "The breach of the contract," says Chitty, "being obviously an essential part of the cause of action, must in all cases be stated in the declaration." 1 *Chitty Pl.* 365. This, in the complaint under consideration, is wholly wanting. It does not even allege an *existing* indebtedness.

In *Allen v. Patterson*, 7 *N. Y.* (3 *Seld.*) 476, the complaint was as follows: "The plaintiffs complain against the defendant for that the defendant is indebted to the plaintiffs in the sum of three hundred and seventy-one dollars and one cent for goods sold and delivered by the plaintiffs to the defendant at his request, on, &c., . . . and the plaintiffs say that there is *now due* them from the defendant, the sum of three hundred and seventy-one dollars and one cent, for which sum the plaintiffs demand judgment."

Upon demurrer this court held the complaint good, Judge JEWETT, who delivered the opinion of the court, remarking that it contains every statement of fact necessary to constitute a good *indebitatus* count in debt, according to the mode of pleading before the Code. But in that case the allegation that "there is now due to the plaintiffs three hundred and seventy-one dollars and one cent," plainly expressed the fact that the purchase price of the goods had become due and remained unpaid, and particular stress was laid by the court upon that allegation.

CHITTY, in speaking of the *indebitatus* count in debt, says: "The *indebitatus* count states that the defendant, on, &c., was 'indebted to the plaintiff,' in a named sum of money 'for goods sold,' . . . and although it has been usual to conclude each count with the allegation that 'by reason of the sum of money being unpaid, an action had accrued to the plaintiff to demand and have the same from the defendant, being parcel

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of the money above demanded,' yet that allegation is unnecessary, and the *usual breach* at the end of the declaration will suffice." 1 *Chitty Pl.* 394, 7 Am. ed. I am not aware of any case or any book of forms, before or since the Code, which dispenses with the allegation of a breach of the contract or duty on which the action is founded. Indeed, when the action is founded upon the contract, obligation, or duty of the defendant, the very gist and essence of the cause of action is the breach thereof by the defendant.

Unless a breach is alleged therefor, no cause of action is shown.

I am unable to avoid the conclusion that the demurrer is well taken, and that the judgment of the court below is erroneous and should be reversed.

All the judges concurred, except GROVER and HUNT, JJ., and FULLERTON, J., not voting.

Judgment reversed, and judgment for defendant on demurrer, with costs.

WOLFE v. SCROGGS.

June, 1866.

The provision of the acts of 1848 and 1849, allowing a married woman to take by "grant" from any person other than her husband, empowers her (with her husband's assent) to take a mortgage payable to herself, for a debt which was due to both of them; and no one but the husband's creditors can impeach the mortgage on that account.

Maria A. Wolfe sued Gustavus Adolphus Scroggs, sheriff of Erie, in the supreme court, for taking her five cows on an execution against one Schmidt. She claimed to hold the cows by virtue of a chattel mortgage made by Schmidt.

The plaintiff was the wife of Joseph Wolfe. Schmidt was their son-in-law, and being indebted to Mr. and Mrs. Wolfe in the sum of five hundred dollars, they had advanced to him, he gave Mrs. Wolfe a chattel mortgage to secure two hundred dollars, she giving him at the time of execution ten dollars.

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The question was whether this mortgage was void, because without consideration, or for want of capacity in the wife to take it, or to make such contracts, or because it could be taken and enforced by the husband alone. The marriage took place before 1847; the mortgage was made in 1859.

The supreme court held that the mortgage was valid; and defendant appealed.

WRIGHT, J.—The plaintiff was a married woman. In April, 1859, one Joseph Schmidt executed and delivered to her a chattel mortgage upon five cows and other property. The defendant, as sheriff of Erie county, in July, 1859, took the cows on an execution in favor of Allen McDonald against Schmidt. McDonald was, at the time the mortgage was executed, a simple contract creditor of Schmidt, and, although it was not proved, that he subsequently recovered a judgment for the amount of his debt, or that the execution issued to the defendant, by virtue of which he levied upon and took the cows, had any judgment to support it, the fact seems not to have been questioned, but inferentially conceded, at least, by the plaintiff in her complaint. Without such judgment, the defendant was in no position to raise any question as to the validity of the mortgage. But assuming that he was in a position to raise the question, that the mortgage was without consideration, and that it was fraudulent as to the creditors of Schmidt, how, then, stands the case? The jury passed upon the latter question, under instructions not complained of, and their verdict is conclusive as to the good faith of the transaction. That question is, therefore, out of the case. Was there any or sufficient consideration for the mortgage? The question arises upon exceptions to a portion of the charge of the judge. The evidence given proved, or tended to prove, this state of facts. The plaintiff was a married woman at the time she took the mortgage, and so continued to the trial. She and her husband came from Germany, in 1847, and brought with them over one thousand dollars, the proceeds of a house and lot sold in Germany. One Stengel seems to have had an interest in the money, and they were to support him, and he

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came with them to this country. About twelve years before the trial, Schmidt married their only daughter, and about the time of their marriage, they let him have five hundred dollars, he agreeing, when he received the money, to support and take care of the plaintiff, her husband, and Stengel. Schmidt was getting along poorly for some time previous to giving the mortgage, and the plaintiff had been urging him for some security. He said it was right that he should, and that he would give it. She finally asked him for the chattel mortgage in question, and he gave it, and at the time she let him have ten dollars.

Upon this proof, substantially, the judge refused to charge the jury to find for the defendant, but charged, among other things, that if they believed from the evidence that Schmidt, or Schmidt and his wife, received the money upon the agreement, or understanding that Schmidt should contribute to the future maintenance or support of the plaintiff, or of the plaintiff, her husband, and Stengel, such agreement afforded sufficient consideration for the mortgage. This, I think, was not error. Schmidt receives some five hundred dollars (let it be conceded from the husband of the plaintiff), upon an agreement that he, Schmidt, would support or contribute to the future support and maintenance of the plaintiff, her husband, and Stengel. The plaintiff desired security, and Schmidt gave to her alone the chattel mortgage, her husband being still living. I can not doubt there was a good consideration for the mortgage. Concede that the jury found the contract to have been made with the husband; the plaintiff had an interest in the contract. Though a wife, and though her husband was bound to support her, she had certainly an interest in being supported. The husband had made a provision for her support, and this person who had come under obligation to support her, gives her some security for such support. As was pertinently asked by the learned judge who delivered the opinion in the court below, suppose he had given a mortgage upon real estate, running directly to her, and in which all the facts were recited, can any one doubt that such mortgage would be upheld? I think not.

If it can be said that the motion for a nonsuit raised the question of the capacity of the plaintiff, a married woman, to

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take the mortgage and to maintain the action in her name alone, I am of the opinion that it was correctly disposed of. The statute "For the more effectual protection of the property of married women," (*L.* 1848, ch. 200; *Id.* 1849, ch. 275,) declares that any married female may take, by gift or grant, from any person other than her husband, and hold to her sole and separate use, real and personal property; and, I concur, with the supreme court, that the word "grant" is broad enough in meaning to embrace this case.

The provisions of the Code disposed of the questions as to the capacity of the plaintiff to sue. It is provided that the action must be prosecuted in the name of the real party in interest, and that where the action concerns the separate property of a married woman, she may sue alone. *Code of Pro.* §§ 111, 114.

The judgment should be affirmed.

MORGAN, J.—It is made a question in this case by the appellant's counsel whether the plaintiff, being a married woman, was competent to take a personal mortgage in her own name, except it related to her separate property.

Since the statute of 1848 and 1849, her capacity to take by gift, grant, or devise, from any person other than her husband, real and personal property, and hold it to her separate use, with the like effect as if she were unmarried, has been repeatedly decided, and indeed could not be questioned under the provisions of the act of 1849 (*L.* 1849, p. 528, § 2). *Knapp v. Smith*, 27 *N. Y.* 277.

I think the language of that section has been misconceived in some of the cases, by want of attention to the common law disability of man and wife to contract with each other. It was always competent for the husband to transfer his property to a third person, and for the wife to take title to such property through such third person instead of the husband. But the marital rights of the husband would then attach, and he might again reduce her personal property to his possession and control, unless a court of equity interfered to restrain him.

Now, by the statutes of 1848 and 1849, his marital rights are swept away; and it is no longer in the power of the hus-

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band or his creditors, except in cases of fraud, to seize upon property thus transferred as the property of the husband.

The husband may now indirectly vest all his estate in his wife, notwithstanding the provisions of section 2 of the act of 1849.

When she takes title to property from a third person she does not take it from her husband within the meaning of that section, although he once owned it, and transferred the legal title to such third person for the sole purpose of ultimately vesting it in his wife. There is no longer any legal objection to the wife's acquiring and retaining the title to her husband's property, except the common law disability of the one to convey or transfer such property to the other, which disability is still retained by the statutes of this State.*

Another objection is made that there is no consideration as between the parties to the mortgage.

It is admitted, however, that the plaintiff's husband had the right to take such a mortgage to secure the repayment of the moneys which Schmidt, his son-in-law, had obtained under an agreement to support and maintain the plaintiff and her husband.

As the execution was against Schmidt, and not against the plaintiff's husband, what possible interest can the defendant have in such a question?

The title did not come from the plaintiff's husband to his wife, but from Schmidt; and whether the mortgage was taken to the one or to the other was a matter of no sort of consequence to Schmidt's creditors. Nor was there any impropriety in the husband's consenting to have the legal title vested in his wife in such a case. No one but the husband's creditors can impeach such an arrangement.

The only questions of difficulty in this case were questions of fact, and they are not open to review in this court.

If there was a debt due from Schmidt to the plaintiff, or to the plaintiff's husband, which the mortgage was intended to secure; and if the transaction was *bona fide* to secure such debt without any intention to defraud the creditors of Schmidt,

* Compare *Hunt v. Johnson*, 44 N. Y. 27, where the limitations of this rule are explained.

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there is no legal objection to the recovery, and the judgment should be affirmed.

All the judges concurred.

Judgment affirmed. with costs.

WOOLSEY v. VILLAGE OF RONDOUT.

September, 1886.

An amendment of a complaint on a certificate of indebtedness issued by a municipal corporation, by alleging instead that the debt was due for services, is not a change of the cause of action, within the rules restricting amendments at the trial.

In an action against a municipal corporation, to recover for services, for which the trustees had issued a certificate of indebtedness, the official character of such trustees may be proved by parol, without producing record evidence. It is sufficient for such purpose, to show that they were officers *de facto*.

A village corporation having power by charter to make local improvements, is liable to one employed by it to do the work, for his compensation.

In such action, the trustees certificate of indebtedness or of the amount due is admissible, without producing the records. It is not regarded as secondary evidence.

George C. Woolsey sued the trustees of the village of Rondout in the supreme court, alleging in his complaint that the defendants were a body corporate and politic, organized under the laws of this State, and were on a day named indebted to him in a sum specified, and then delivered to him a certificate of indebtedness "certifying that there is due a debt on the books of the village of Rondout to George C. Woolsey for the sum of," &c. ; signed by the clerk ; that payment had been demanded and refused, and that "defendants are justly indebted to the plaintiff for the cause aforesaid in the sum of," &c.

The answer denied the plaintiff's allegations ; and then, by a second defense, stated that the claim of the plaintiff was for building a wall for the benefit of private property principally belonging to the defendant ; and that the charter of the village did not confer any authority upon the municipal corporation to incur any indebtedness or liability for such a purpose.

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The issue was referred; and upon the hearing, the defendants objected that the complaint did not state facts enough to constitute a cause of action. Thereupon, on plaintiff's motion, the referee allowed an amendment to the complaint, by which plaintiff alleged that the sum claimed was due him for work, services, and labor performed by the plaintiff upon a public highway within the limits of the village of Rondout, at the request of the defendants.

This amendment was allowed against the defendants' objection that it constituted a new complaint, and set up a new cause of action. An adjournment, with liberty to defendants to amend their answer if desired was given, but no amendment of the answer was made.

The referee found that defendants were incorporated, April 4, 1849, by an act of the legislature, and their powers defined in the act of incorporation, and the several acts amendatory thereto, passed April 9, 1851, March 19, 1852, and March 17, 1857. In the winter of 1859 the trustees caused the roadway of Division-street to be widened; that a portion of the work rendered necessary to be done by this improvement, was done and performed by the plaintiff under two several contracts with the trustees, and that the trustees awarded and allowed him therefor the sum three hundred and eighty-six dollars and sixty-two cents, and afterward delivered a certificate of such indebtedness to the plaintiff, accompanied by a draft or order upon the treasurer, payable four months from date, and bearing date April 6, 1859, which, although presented at maturity, was not paid.

The referee gave judgment for plaintiff.

The supreme court held that the amendment, and the terms of making it, were reasonable, that the evidence was not incompetent by reason of there being record evidence, for 1. It was competent for plaintiff to show who employed him; 2. Defendants were chargeable with the acts and contracts of their officers *de facto*; 3. That the clerk's certificate and the trustees' drafts being passed by the supervisors and approved by audit were admissible; and 4. That parol evidence of the trustees' acceptance of the plaintiffs' proposal having been duly admitted

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without objection, it was not for plaintiff to prove the true contract if it differed from that which appeared by parol. They accordingly affirmed the judgment. Defendants appealed.

Lawton & Stebbins, for defendants, appellants.

That a person dealing with a municipal corporation is bound and presumed to know its powers. *Mayor, &c. of Albany v. Cunliff*, 2 *N. Y.* 165; *Radcliff v. Mayor, &c. of Brooklyn*, 4 *Id.* 196; *Halstead v. Mayor, &c. of New York*, 3 *Id.* 430; *Hodges v. City of Buffalo*, 2 *Den.* 110.

That the official character of the officer of the village could only be proved by record evidence, and that the acceptance of plaintiff's proposition must be proved in the same way. *Dobbins v. Watkins*, 3 *Johns. Cas.* 415; 2 *Phil. Ev.* (Edwards ed.) 573; note 475, citing *Dennison v. Barber*, 6 *Serg. & R.* 420; 1 *Greenl. Ev.* (6th ed.) 260, § 201; citing *Watson v. Moore*, 1 *Carr. & Kir.* 626; *Denning v. Roome*, 6 *Wend.* 651, 655, 656; *Owings v. Speed*, 5 *Wheat.* 420, 424; 2 *Phil. Ev.* (Edwards ed.) 296; *Ronkendorf v. Taylor*, 4 *Pet.* 349, 360; *Meeker v. Van Rensselaer*, 15 *Wend.* 397, 399; *Jackson v. Dally*, 5 *Id.* 526; 1 *Greenl. Ev.* (6th ed.) 115, § 87, and cases there cited; especially *Whitford v. Tutin*, 10 *Benj.* 395; see also, *People ex rel. Burr v. Leyst*, 23 *N. Y.* 140.

Amasa J. Parker, for plaintiff, respondent.

That defendants had power to make the contract and were liable under their charter, cited 1 *L.* 1857, 243; 2 *R. S.* (5th ed.) 381.

That, having received the benefit of the plaintiff's work, they were estopped from denying that they had power to make the contract. *Mechanics' Bank v. N. Y. & N. Haven R. R. Co.*, 13 *N. Y.* 599; *Steam Navigation Co. v. Weed*, 17 *Barb.* 378; *Silver Lake Bank v. North*, 4 *Johns.* 370; *State of Indiana v. Woran*, 6 *Hill*, 37; *Chester Glass Co. v. Dewey*, 16 *Mass.* 102; *McCutcheon v. Steamboat Co.*, 13 *Penn.* 13; *Palmer v. Lawrence*, 4 *Sandf.* 170.

That it was competent to prove who were the officers of the corporation by reputation and their acts. *People v. Bedell*, 2 *Hill*, 196, 199.

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MORGAN, J. [After stating the facts.]—The evidence by which these facts were proved was strenuously resisted, and the case bristles with exceptions. They may all, however, be grouped into classes and disposed of without difficulty.

I. It may be admitted that the original complaint was not sufficient to resist a demurrer; but the defendants having gone down to trial, I think it was right in the referee to allow the amendment. Although the objection was not obviated by the defendants' neglect to put in a demurrer, it was obviated by the amendment. Indeed, the referee was not required to dismiss the plaintiff's complaint on the defendants' motion, but might have proceeded to try the action without an amendment. The evidence on the trial having supplied the defect, the plaintiff would be entitled to amend, even after judgment. *Lounsbury v. Purdy*, 18 N. Y. 515. If a defendant will lie by until the trial before objecting to the sufficiency of the complaint, I think it is a proper exercise of discretion in the court or referee under section 173 to allow the necessary allegations to be supplied by amendment, when they do not amount to a new cause of action.

II. The defendant's counsel also insisted before the referee that the official character of the officers of the village could not be proved by evidence showing that they acted and were reputed as such, but that record evidence was necessary. This objection was clearly untenable, as it was sufficient for the purposes of this action to show that they were officers *de facto*.

III. The defendants' counsel also insisted that the certificate of indebtedness and drafts drawn by the president upon the treasurer were improperly admitted in evidence. This objection is equally untenable. The recovery was not based upon these documents, but upon proof of the contracts under which the plaintiff performed the labor. And these papers were admissible, in connection with the parol evidence, to show a settlement between the plaintiff and corporation of the amount due. There was abundant proof that these papers were made under the authority of the trustees and delivered to the plaintiff as vouchers, upon which the treasurer might with propriety have paid the amount of the plaintiff's claim.

IV. The defendants' counsel also objected to proving by

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parol evidence an acceptance by the corporation of the plaintiff's written propositions to perform the labor. But no objection was made to such proof until after it was given. If there was anything in their resolution of acceptance changing the terms of the contract, the defendant might have procured it. At all events, *his* objection came too late to be available.

The act of incorporation, as amended in 1857 (*Laws of 1857*, vol. 1, p. 243, § 3), constituted the village of Rondout a separate highway district, and clothes the trustees with all the powers and duties of commissioners of highways therein; and provides that the money raised by assessment for highway purposes, shall "be expended under the direction of the board of trustees in making and keeping in repair the highways, bridges and roads within the corporation, in such manner as they judge it the most beneficial to the public."

And by section 4 of the act of 1857, the trustees, by a unanimous vote of the board, may make and cause to be made, sewers drains and vaults through any street, also patch, level, raise, repair, mend, clean, macadamize and pave any of the streets, if, in their opinion, it shall be considered a public benefit both as to convenience and salubrity of the place. The expenses of these improvements are required to be assessed upon the owners or occupants of all the houses and lots intended to be benefited thereby. The amount of the estimated expense is required to be made by five disinterested freeholders to be appointed by the trustees, and their certificate being returned and ratified by the trustees, or a majority of them, is made binding on the owners and occupants. The amount when collected is required to be paid to the treasurer of the corporation, to be paid out by him on the order of the said board of trustees, or a majority of them, toward making any of the above named improvements.

It is not disputed but that the treasurer had moneys in his hands applicable to the improvement of Division-street, and whether it came from the highway tax or from an assessment upon the owners of the lots under section 4, is, I think, quite immaterial.

The improvement itself was clearly within the discretion of the trustees, and it will be presumed that they proceeded legally until the contrary appears. *Exp. Clapper, 3 Hill, 458.*

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As was said by SELDEN, J., in *Ketchum v. City of Buffalo*, 14 N. Y. 364, "Every contract for labor not paid for in advance is necessarily a contract upon credit, because the labor once performed can not be recalled." If the trustees could make the improvement, they could employ the defendant to do the labor, and make the corporation liable for their acts. *Conrad v. Trustees of Ithaca*, 16 N. Y. 158; *Messenger v. City of Buffalo*, 21 N. Y. 196.

I think the judgment should be affirmed.

DAVIES, Ch. J., and WRIGHT, J., did not concur.

Judgment affirmed, with costs.

WRIGHT v. AMES.

December, 1865.

Although, every member of a firm, is, in a sense, a general agent of the firm, a firm is not necessarily the agent, general or special, of any other firm in which either of its members is a partner.

A firm of warehousemen delivered to third persons, as being the property of L. wheat belonging to a firm of merchants, and the latter sued the transferees for conversion. *Held*, that the fact that L. was a member of both firms, was no defense.

Luther Wright, as assignee of the firm of J. & I. Lewis, brought an action against Henry M. Ames and others, constituting the firm of Ames, Howlett & Co., for the conversion of personal property.

The facts are as follows: In 1856, William Lewis, a silent partner in the firm of J. & I. Lewis, and also a partner in the firm of Rathbun & Lewis, was the owner of several cargoes of wheat, which were stored in the Empire Elevator, owned by Rathbun and Lewis. Among these cargoes was that of the schooners S. J. Holley, and Northern Belle.

The defendants made advances to William Lewis, and as security, took a transfer of his wheat to be sold by them on commission, and the avails applied on their advances, and took the

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warehouse receipts in their own name, by which it was declared that the wheat was held in store subject to their order.

On and before December 19, 1856, William Lewis, without the knowledge or consent of the defendants, took from the cargo of the Holley, two thousand one hundred and fifty bushels, and from the cargo of the Northern Belle, one thousand bushels, and appropriated them to his own use.

All the residue of his wheat was from time to time delivered from the elevator on the orders of the defendants.

During the same month of December, J. & I. Lewis were owners of cargoes of wheat also stored in the Empire Elevator, on which the defendants had made advances in the same way as upon the wheat of William Lewis. On May 14, 1857, the defendants, by a written order, addressed to the Empire Elevator, directed the delivery, to Ames & Sloan, of two thousand six hundred and twenty-four bushels of the cargo of the Holley. Upon this, the elevator delivered four hundred and seventy-four bushels of the cargo named, which exhausted the same, and two thousand one hundred and fifty bushels of wheat belonging to J. & I. Lewis. On May 18, the defendants by a like order, directed the delivery of one thousand bushels of the cargo of the Northern Belle to Ames & Sloan, and there being no part of that cargo left in store, the quantity was delivered from the grain of J. & I. Lewis. Ames & Sloan sold the wheat received on these orders, on account of defendants, and the proceeds were credited by defendants to William Lewis.

The defendants accounted to J. & I. Lewis for all the wheat pledged by that firm to them, except the two above mentioned quantities, and on May 21, 1857, J. & I. Lewis paid defendants the amount found to be due them.

The claim was assigned to the plaintiff, who brought this action.

The referee having found these facts gave judgment for the plaintiffs for the value of the two parcels.

The supreme court, at general term, affirmed the judgment. Their opinion went upon the ground that William Lewis had taken the wheat of J. & I. Lewis to pay his private indebtedness, and that it was, in fact, an attempt by one partner to

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pay his precedent, individual debt, by a transfer of the effects of the copartnership. That the cases which sustained the act of one partner in disposing of the partnership effects to discharge his private debts, were those where the transfer was made for a valuable consideration received at the time the property was parted with ; but that in this case the only consideration for the transfer being a precedent debt, which did not constitute a valuable consideration to operate to defraud a third party, the defendants acquired no title to the property. Defendants appealed.

George F. Comstock, for defendants, appellants.

W. F. Allen, for plaintiff, respondent.

DAVIS, J.—When the defendants drew their orders on the Empire Elevator for the delivery to Ames & Sloan of two thousand six hundred and twenty-four bushels of the cargo of the S. J. Holley, and one thousand bushels of the cargo of the Northern Belle, there was none of the latter, and but four hundred and seventy-six bushels of the former remaining in store. The deficiency had long previously been surreptitiously taken out by Wm. Lewis ; and Rathbun & Lewis, the owners of the elevator, committed an additional fraud by delivering to Ames & Sloan, who were the agents of defendants, three thousand one hundred and fifty bushels of the wheat of J. & I. Lewis.

There was no pretense of a sale of this wheat, for a valuable consideration, to defendants. It was delivered to them simply as a part of the wheat which they held as security for the indebtedness of William Lewis, and not upon a purchase and sale from Rathbun & Lewis or William Lewis, nor upon any new consideration whatever. Ames & Sloan received this wheat to sell on commission for defendants, and, having sold the same, paid over the proceeds to them. It is difficult to conceive any principle upon which this process can be held to have changed the ownership of the wheat. Grant that defendants were in total ignorance of the fact that the wheat delivered was the property of J. & I. Lewis, their want of knowledge, and consequent innocence of design to obtain that wheat,

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could have no effect upon the title. The wrong which injured them had long before been perpetrated, and its consequences are not to be shifted on to other shoulders because dishonest warehousemen have delivered to them the property of others where they demanded their own. Nothing but the assent of J. & I. Lewis that their wheat might be substituted and delivered for that wrongfully taken could have the effect to change the title of the property. The referee has failed to find any such assent, but, by his conclusions of law, if not by an express finding of fact, has necessarily negated its existence. But it is argued, in substance, that, from the facts found, the law, by necessary implication, declares this assent, and, consequently, the legal conclusion of the referee is wrong. To this position the point must be reduced, because the defendants failed to ask for any express finding in their favor on this question, and to except to any omission or refusal so to find.

The fact out of which this implication must grow, if at all, is, that William Lewis was a member both of the firm of J. & I. Lewis, and of the firm of Rathbun & Lewis, and it must be established that the act of the latter firm, though greatly to the prejudice and injury of the former, derives the impress of their assent from this relationship of William Lewis to both firms. It nowhere appears that William Lewis acted personally in the delivery of the wheat in question, nor that he assumed to act as a member of or on behalf of the firm of J. & I. Lewis in such delivery. On the contrary, the findings indicate that the wheat was delivered by Rathbun & Lewis, and the evidence shows that the delivery was made by the servants of that firm without the personal intervention of William Lewis. Every member of a firm is in a certain sense the general agent of the firm; but it has never been held, I think, that every firm is the agent, general or special, of every other firm of which either of its members is also a member. Such a doctrine would be no less novel than dangerous, and should not be announced by this court without a clear line of authority requiring it. When, therefore, Rathbun & Lewis assumed to deliver the property of J. & I. Lewis to make up a deficiency which their wrongful act had created, that firm were not agents of the owners of the property without an express authority. The law could imply

none from the fact that one of their members was also a partner in the firm of J. & I. Lewis, because, in making the delivery, they acted as a firm standing upon its own rights, and not as agents of another copartnership; because as a firm they were not members of the owner's firm; and because the individual who was such member did not assume to act on his own behalf, nor upon the agency for the other firm, which his relationship to them conferred upon him.

We are not, therefore, in my judgment, called to pass upon the question as to what would have been the effect, if Wm. Lewis had taken the wheat of J. & I. Lewis from the firm of Rathbun & Lewis, and delivered it to defendants on his private indebtedness; for no such state of facts is found or proved. Even in that case it would be difficult to uphold defendant's title, whatever rights equity might secure to them in the ultimate interest of William Lewis in the property. 3 *Kent Com.* 40; *Story on Agency*, § 124; 1 *Bouv. Inst.* 104; *Colly. on Part.* § 503; *Story on Part.* § 133; *Rogers v. Batchelor*, 12 *Peters*, 221; 3 *Pick.* 54; 16 *Johns.* 34.

The defendants also insist that J. & I. Lewis ratified the act of delivering their wheat to apply on William Lewis' debt to them, by the settlement of their account and the payment of the balance claimed against them. Here also the defendants are embarrassed by the fact that the referee has not only failed to find such ratification, and was not requested to find it, and an exception taken to his refusal; but also by a pretty distinct express finding and a necessarily implied one the other way. Certainly the referee could have given no judgment against defendants without necessarily holding that the act of applying the wheat to William Lewis' debt was not ratified by J. & I. Lewis; and, as this court is to uphold judgments by intendment when not contrary to facts found or proved, it would be going far to say that we should spell out a ratification from any evidence in this case in order to overturn the judgment. Besides, the referee has found the facts (which he mistakenly states as conclusions of law) "that there was no appropriation of the avails and proceeds of the sale to the credit of William Lewis, or to any purpose, by the authority of J. & I. Lewis, or by any agency binding on them," and "that the application of

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the moneys realized from the sale of the wheat to the payment of the debt of William Lewis was unauthorized and in fraud of the rights of J. & I. Lewis."

The settlement was obviously made, I think, for the purpose of bringing the matter to a point where J. & I. Lewis, or their assignee, could demand the wheat or its proceeds discharged of any lien of the defendants; and there was no intent on the part of either party to cut off the claim, as it would have been inequitable to have done. It is not necessary or profitable to pursue the idea of ratification further.

The point that defendants should at least have been allowed to retain the supposed interest of William Lewis in the proceeds of the wheat is abundantly answered, I think, by the views above suggested, on the question whether he, either personally or as a member of the firm of J. & I. Lewis, transferred any such interest to defendants. No tortious act of Rathbun & Lewis could make the defendants joint tenants or tenants in common of J. & I. Lewis in property wrongfully converted; and hence this question is already sufficiently disposed of. Besides, it was not urged or raised below; and this court has repeatedly held that it does not sit to instruct parties as to how their causes could have been better tried.

I think the judgment should be affirmed.

A majority of the court concurred.

Judgment affirmed, with costs.

WRIGHT v. ROWLAND.

December, 1868.

Reversing 36 How. Pr. 115.

An appeal lies to this court, from an order of the general term, made upon appeal from the special term, vacating an attachment after judgment recovered in the action.*

Property seized on an attachment issued as a provisional remedy, is held to meet the ultimate recovery in the action, not merely to meet

* Compare *Yates v. North*, 44 N. Y. 271.

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such judgment as may first be recovered. Hence, pending plaintiff's appeal from a judgment awarding him only part of his claim, defendant is not entitled to have the attachment vacated on payment of such part.

Hiram Wright, as administrator, &c., prosecuted this action against Mary A. Rowland, in the supreme court, to recover upward of nine thousand dollars and interest. Attachments were issued, under which property of the value of nine thousand dollars or thereabouts was seized and held by the sheriff to answer the judgment in the action.

Issue being joined, the action was referred and tried; and upon the decision of the referee judgment for plaintiff was entered for five hundred and twenty-eight dollars and seventy-two cents, including costs, on Feb. 7, 1868.

The plaintiff, dissatisfied with the amount of the recovery, and questioning the grounds upon which the referee disallowed, to so great an extent, his claims in the action, appealed from the judgment to the general term of the supreme court, where his appeal was still pending.

After the taking of such appeal, the defendant, upon these facts, and an offer to pay the judgment entered for five hundred and twenty-eight dollars and seventy-two cents, moved a special term, for a discharge of the attachment. The motion was there denied, and the defendants appealed.

The supreme court, at general term, held that the pendency of the appeal from the judgment, did not affect the defendant's right to have the attachment discharged; and ordered that, on payment of the amount of the judgment and interest and costs of appeal, within five days, the attachment be, and the order declared that it "is, hereby discharged." Reported in 36 *How. Pr.* 115. Plaintiff appealed.

John K. Porter, for plaintiff appellant, insisted that the appeal from the judgment on the merits was but a continuation of the original suit, and the attachment was security for whatever might be finally recovered.

John E. Burrill, for defendant, respondent, insisted that the

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order was not appealable; that it was not a vacatur, but relief granted on terms; and that the judgment must be deemed final so far as the attachment was concerned.

BY THE COURT.—WOODRUFF, J. [After stating the facts.] —1. It is objected that the order is not appealable and can not, therefore, be reviewed in this court.

There is no ground for this objection. This court has jurisdiction "to review on appeal every actual determination made at a general term by the supreme court," "in a final order affecting a substantial right made . . . upon a summary application in an action after judgment." *Code of Pro.* § 11, subd. 3.

The order appealed from is such a determination; it was made after judgment had been rendered, on summary application by motion. It was, therefore, in no wise included in the judgment, and no appeal from any judgment in the action could bring it under review.

It affected a substantial right. A right, because if the property seized on the attachment is by law to be held to meet any ultimate recovery by the plaintiff in the action in which the attachment was issued, then he has a legal right to have it continued in force; and, on the other hand, if such property can only be held for the payment of the judgment which has been entered, then the defendant had a legal right to have it discharged upon payment of that judgment. Where a case for an attachment as provided by statute exists, there is no discretion to be exercised on the question of the allowance of the attachment, or of its continuance for the purposes for which it legally operates.

2. The question therefore properly before us is, is property which has been duly attached, held to meet the ultimate recovery in this action, or only to meet the judgment which may be first rendered upon the issues made up between the parties?

The language of the statute seems to me quite explicit. It says that the plaintiff, in the cases enumerated, may have the property of the defendant attached "as a security for the satisfaction of such judgment as the plaintiff may recover." *Code,*

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§ 227. The sheriff is required to "keep the property seized by him . . . to answer *any* judgment *which may be obtained* in such action." § 232.

When the defendant appears and applies for the discharge of the attachment upon giving security as a substitute therefor, he must give an undertaking with at least two sureties to the effect "that such sureties will, on demand, pay to the plaintiff the *amount of judgment that may be recovered* against the defendant in the action." § 241.

If I were to seek for language in which to describe the plaintiff's recovery against the defendant, I could find none more explicit or comprehensive than "any judgment which may be obtained in such action."

The object of the statute is, that in cases in which the plaintiff is entitled to this provisional remedy, he may have security for the realization of whatever may be the fruits of the litigation, and the terms of the statute appropriately express this object.

If a new trial be granted the action is still pending, and a judgment will thereafter be pronounced in the action, it may be in favor of the plaintiff. Surely that judgment is included in the expression, "any judgment which may be obtained in such action."

True, the judgment which has been rendered in the action is, in a sense, "a final determination of the rights of the parties to the action;" it is so defined in the Code, § 245; but the argument for the respondent gains no strength from the designation, "final judgment." If the sections relating to the attachment, had used the words "to answer the 'final' judgment," the question would still be open whether "final" was not used there to describe any ultimate recovery. But the respondent here has not even the possible suggestions which in that case could be urged. That is not the language of the sections; "any judgment" includes a judgment recovered in the action after a new trial, or after any number of new trials, as precisely and as completely as it does the judgment which may be rendered on a first trial.

The judgment which has been rendered is, in the plain terms of the Code, a final judgment, *i. e.*, it purports to finally determine the rights of the parties to the action, and so long as it

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remains unreversed and in full force, it does determine those rights. But it is the subject of appeal and review, and it may be wholly set aside and held for nought; if it be reversed the action will then be pending and undetermined, and the plaintiff will be at liberty to proceed to obtain judgment in the action. That judgment, which was final so long as it was in full force, and which operated temporarily as a determination of the rights of the parties, was not final in any other sense. It seems to me, however, that to multiply words on this point is unnecessary.

It is, however, proper to notice the suggestion, that the court will not presume the judgment appealed from to be erroneous, but the contrary; and that the motion was properly granted on the presumption that the judgment is right, and that the plaintiff will not recover any better judgment.

The answer is obvious. The court on the motion are not called upon to indulge any presumption—certainly not a presumption that, because the judgment has been appealed from, it is erroneous. But they are called upon to notice that the same statute which authorizes an attachment, also authorizes an appeal from the judgment and a review thereof to test its correctness, and has given to the plaintiff a right to such review, in order to inquire whether it be erroneous or not, and the same statute contemplates the possibility of a reversal, and provides for ulterior proceedings in the action, in the event of such reversal leading to a new trial and judgment.

When, therefore, that same statute, with these provisions in full view, declares that the property attached shall be kept to answer any judgment which may be obtained, there is little room for doubt as to the meaning.

The principle of the decision of this court in *Robinson v. Plimpton*, 25 *N. Y.* 484, 485, is in direct opposition to the decision made in the court below, and the questions decided in the cases cited there are in very close identity with that now before us.

The order appealed from should be reversed.

All the judges present concurred, except GROVER, J., who did not vote.

Order of general term reversed and that of special term affirmed, with costs.

ADDENDA.

[The following cases were not inserted in their alphabetic order by reason that the papers, or some essential information, was not accessible in time.]

BARBOUR v. LITCHFIELD.

December, 1850.

Where a person indebted to a bank, in order to protect the bank, made the cashier thereof, as such, his attorney to collect certain dues to him, and the cashier, at the same time, undertook, by an instrument in which he signed himself "cashier of the Farmers' and Mechanics' Bank," to pay the debtor certain moneys from the proceeds; *Held*, that an action would not lie on the instrument so signed against the cashier as an individual (after he had ceased to be an officer of the bank).

Mary A. Barbour, by her next friend Frederick S. Talmadge, in the year 1853, brought an action in the supreme court against Elisha C. Litchfield, on an alleged undertaking by him, to pay certain sums of money to John M. Barbour, the plaintiff's assignor.

At the trial at special term before the court without a jury, the following facts were found :

John M. Barbour, being indebted to the Farmers' and Mechanics' Bank of Detroit, Michigan, on November 7, 1850, executed a bond constituting the defendant as cashier thereof, his attorney to collect a United States Treasury warrant for six thousand seven hundred and sixty dollars $\frac{81}{100}$ issued in his favor on an Indian claim, so called, for eight thousand four hundred and thirty-five dollars $\frac{81}{100}$ which he had filed. Elisha Litchfield, the defendant, at the same time executed an instrument which he signed as "cashier of the Farmers' and

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Mechanics' Bank," contracting to pay to Barbour two hundred and fifty dollars from the sum collected on the warrant from the further proceeds of the claim which had been previously assigned by Barbour to the bank above named. By this instrument Litchfield as cashier moreover promised to pay to Barbour one-sixth part of the amount recovered on the claim beyond the warrant already issued and now assigned to him, provided the said sixth part did not exceed two hundred and fifty dollars, and he agreed to pay that sum if it did. On November 8, 1850, John M. Barbour assigned this instrument to Walter Smith as trustee for Mary A. Barbour the plaintiff, and on September 12, 1852, Smith assigned the same to the said Mary.

John M. Barbour was, at the time he assigned the claim to the bank, indebted thereto in the sum of nine thousand dollars, which indebtedness has been met only by the proceeds of the warrant and the further sum on the Indian claim admitted by defendant's answer to have been received.

Litchfield ceased to be cashier in May, 1851.

The defendant by his answer was held to have admitted the receipt by him as cashier of the face of the warrant, and four hundred and fifty-seven dollars $\frac{2}{3}$ on the further claim referred to in his undertaking.

Judgment was rendered for the plaintiff for the sum of five hundred and eighty-five dollars $\frac{2}{3}$, the same being two hundred and fifty dollars from the proceeds of the warrant, and one sixth of the further sum recovered on the claim, with interest on both and the costs of the action.

The supreme court at general term affirmed the judgment. Defendant appealed.

Wm. C. Noyes, for the plaintiff, respondent.

Charles Tracy, for the defendant, appellant.

GRAY, J.—The claim upon which the defendant received the amount recovered against him, was assigned to him by Barbour in terms *as cashier* of the Farmers' & Mechanics' Bank, and

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not to him individually—using the style of his occupation as a description of his person. When he was dealing with the defendant, he knew, therefore, that he was dealing with him as agent for the bank, not upon his own account. This question has recently been fully considered in *Genesee Bank v. Patchin Bank*, 13 *N. Y. (3 Kern.)* 309.

The judgment must be reversed and a new trial ordered.

Judgment reversed and new trial ordered.

BYRNE *v.* WEEKS.

September, 1865.

Affirming 7 Bone. 372.

The owner of a vessel, in an action brought by him for freight money against the assignee of a bill of lading which the owner has signed, is estopped from setting up a state of facts different from that which he has set forth in the bill of lading, and relying upon which the assignee has paid for the property described therein.

In such an action where the quantity of goods of one description in the cargo had exceeded, and of another had fallen short of the amount stated in the bill of lading, and the assignee thereof had accepted and received such portion of the former class as the bill of lading called for, and the whole of the latter class on board, (or as much of each as the master of the vessel would deliver except he take goods not covered by the bill of lading). *Held*, that he could set up a counter-claim for damages for the non-delivery of the residue of the quantities specified in the bill of lading, not actually received.

And the fact that he was aware of the variance after a part and before the whole of the goods accepted by him were received, does not deprive him of this right.

Nor does the receipt of such part of the cargo by the assignee work acceptance of the goods not enumerated in the bill of lading, nor render him liable for freight upon the whole cargo, but only for freight upon the portion actually received by him under the bill of lading.

James P. Byrne, as assignee of the claim and rights of Patrick Fegan, himself the assignee Thomas Fegan, brought this action against Jacob Weeks, Jr., in the New York superior court to recover the freight on coal transported by Thomas

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Fegan from Port Carbon, Pennsylvania, to the port of New York,—freight on coal so transported which the defendant converted to his own use while subject to the lien of the plaintiff's assignor, for freight and for demurrage. The answer set up a counter-claim for goods mentioned in the bill of lading (under which the defendant received the goods alleged in the complaint to be delivered), not delivered to the defendant.

The facts proved at the trial were that Thomas Fegan executed a bill of lading, representing that one Moore shipped on board Fegan's canal boat seventy-eight tons egg coal, and one hundred tons stove coal at Port Carbon, which Fegan undertook to deliver at New York, to Moore or his assigns, they paying freight at the rate of one dollar and ninety cents per ton and ten dollars per day demurrage for any detention longer than three days. The defendant, at the port of discharge, before the arrival of the boat, bought the cargo of coal of Moore, and took an assignment of the bill of lading. When about ten tons of egg coal had been delivered to the defendant at New York, it was discovered that the boat contained only seventy-eight tons of stove coal but had on board one hundred tons of egg coal. The master delivered about seventy-six tons of egg coal and about forty-nine tons of stove coal, and then refused to deliver more unless the defendant would accept the residue of the egg coal on board. This the defendant refused to do, but demanded the residue of the stove coal and offered to receive enough of the egg coal to make up seventy-eight tons; and also offered to receive the kinds specified in the bill of lading, and the quantity of each therein specified.

There was no detention of the boat beyond the lay days occasioned by any want of readiness on the part of the defendant to receive the coal called for by the bill of lading.

The value of stove coal was greater than that of egg coal.

Fegan demanded freight on the whole one hundred and seventy-eight tons, payment of which being refused, he sued the defendant therefor in the marine court and recovered judgment. He issued execution thereon and had it levied on the coal in the boat, as being the defendant's property, and caused the coal to be removed to a coal yard, for storage, where it was subsequently sold to pay for the storage. At this sale

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the defendant bought it. The judgment obtained by Fegan was reversed and a new trial ordered.

Mr. Justice WOODRUFF, before whom, without a jury, the case was tried, decided that the defendant was liable for freight only upon the coal actually delivered; and was entitled to a deduction from the amount thereof, equal to the value of the coal not delivered, but called for by the bill of lading; and ordered judgment for the plaintiff for the difference.

The superior court, at general term, were of opinion that the plaintiff's assignor was estopped from denying that he had received the goods specified in the bill of lading, since by his representations therein he had enabled the consignee to obtain value thereupon from the defendant. He was therefore liable for the non-delivery of the articles of merchandise enumerated. And even if an action would not lie at the instance of the shipper of the goods or his assignee against the owner of the boat for non-delivery of those described in the bill of lading, because they had never been shipped, yet the shipper's assignee must in equity be allowed to recoup damages arising under the same contract, upon which an action is brought by the owner of the boat or his assignee, the latter being estopped by the allegation in the bill of lading, from showing that he had not the goods described therein. The acceptance of part of the articles will not preclude such a claim. 3 *Wend.* 236; 5 *Hill*, 63.

The receipt of part of the cargo after the discovery of the variance between it and the bill of lading, did not in legal contemplation amount to an acceptance of the whole cargo as it actually stood, nor did it make the defendant liable for the freight upon the whole. The discrepancy was not, as had been urged, one of quality, but of quantity, and a contract as to quantity is divisible, 10 *East*, 295; *Addison on Contracts*, 484; so that the defendant was not obliged to tender back the part which corresponded with the bill of lading, in order to recover damages for the non-delivery of the residue in the form which the litigation had taken.

Delivery of the portion of the goods withheld, on the sale to the defendant to pay storage, did not constitute a delivery under the bill of lading.

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The acts of the master of the boat in regard to the coal stored showed an intention on his part to abandon his lien thereon for the freight money. Moreover, they were delivered to the storekeeper as the property of the defendant. The storekeeper's lien also was paramount to the lien for freight.

Upon these grounds the judgment rendered at special term was affirmed, with costs.

The plaintiff appealed.

F. Byrne, for plaintiff, appellant.

B. Slosson, for defendant, respondent.

DENIO, Ch. J.—By the bill of lading, the owner of the canal boat, whose rights are represented by the present plaintiff, admitted the receipt on board of one hundred tons of stove coal, and seventy-eight tons of egg coal, and he agreed to carry it to New York, and to deliver it there to Moore the shipper, or to his assigns, on payment of the agreed freight. This admission and agreement enabled Moore to dispose of the quantity and kind of coal mentioned to any person who chose to purchase them from him, and the defendant became such purchaser in good faith, and for a valuable consideration. The defendant, by such purchase, became entitled as against the owner of the boat, to receive coals of the quantities and kinds mentioned, on the sole condition of paying the freight agreed on. Instead of there being on the boat when it arrived at New York, the quantity of the stove coal represented in the bill of lading, there was only seventy-eight tons of such coal, but there was an excess of the egg coal, beyond that which was represented in the bill of lading, of twenty-two tons. It seems probable that that was a mistake in filling up the paper by which the figures representing the different descriptions of coal were transposed. But it appears that these different descriptions of coals were known in market by the names used, and that the egg coal was of less value than that called stove coal.

When the error was discovered, it would have been very easy to have adjusted the affair without material loss on either side if a conciliatory spirit had prevailed. But each party claimed

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what he considered to be his strict rights, and this led to a controversy, and to a long litigation, in the course of which each has no doubt expended a sum equal to the whole value of the cargo of coals; and after ten years of controversy we are called upon as a court of last resort to determine what were the rights of the respective parties. We think they are as follows: The defendant as the purchaser for value of the bill of lading was entitled to have delivered to him at New York, the quantities and kinds of coals described in that document, and Mr. Fegan was the party on whom that obligation rested. By signing the bill of lading, he enabled Moore, the consignee, to deal upon the faith of the coal being on board, and upon the duty of Fegan to transport it to the city. The deficiency was in the stove coal; there were only seventy-eight tons of that article, instead of one hundred tons as stated in the bill. The defendant was not obliged to abandon the purchase, and repose upon his remedy against Moore, and against Fegan. A part performance was practicable, and that the defendant was entitled to, without discharging his claim in respect to the part which could not be performed.

As to the egg coal, there was sufficient on board to answer the requirements of the bill of lading, and a surplus. He was entitled to his seventy-eight tons, and he was under no obligation to purchase the residue, or to pay freight on that which he did not receive. He waived nothing by claiming and receiving the delivery of that which belonged to him, even though he knew that the entire performance as to the other description of coal could not be made.

In fact the defendant received nearly fifty tons of the stove coal, and the master refused to deliver any more of that description unless the defendant would receive the whole of both kinds. He moreover received nearly the whole of the egg coal which the contract called for, the deficiency in that being only two or three tons.

The court adjusted the plaintiff's claim, by allowing him the freight at the rate agreed on for the coal actually delivered, and charged him with the value of the remainder, which he was bound to, but did not deliver; and gave judgment against the defendant for the balance. This, I think, was correct.

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The claim for demurrage was properly disallowed. The detention of the boat being shown to be without fault on the part of the defendant, and the time necessary for discharging was wholly due to the default of the plaintiff in not performing according to the exigency of his compact, and to the foolish controversy which ensued, in which he was legally in the wrong. The defendant did not detain the boat.

There is no ground for charging the defendant with the balance of the coal on account of his purchasing it at the sale for non-payment of storage. It was found in the possession of the owner of a coal yard, who claimed a lien on it for storage, and a right to sell it to satisfy that lien. The purchase under that sale was not a receipt of the coal, under the contract. He paid the amount of his bid. Whether he acquired a good title or not is not now a question.

I think the case was legally disposed of by the superior court, and its judgment must be affirmed.

All the judges concurred, except BROWN, J., absent.

Judgment affirmed, with costs.

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June, 1864.

Modifying, on a minor point, the effect of the decision in Vol. I., of this series, p. 555.

The rule that a trust, failing as such, because not authorized by statute, may be valid as a power in trust, may have effect, although it gives the trustees the direction and management of a manufacturing establishment during the life of a beneficiary.

If a part of the beneficiaries designated by the testator, can not take, by reason of which the heirs succeed to their portion of the estate, the heirs must take, subject to the power to manage the property and apply and divide the proceeds between the beneficiaries who can take and the heirs.

In this case, the main decision in which, is fully reported in Vol. I., of this series, an application was made for a reargument on behalf of the executors, as to that part of the ninth clause of the conclusions of the court, stated on p. 549, which

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gave the heirs at law the right of use and management of the mill property in common with the executors.

BY THE COURT.—HOGEBROOM, J.—The question to be now decided arises under the fifth clause of the will of Benjamin Marshall. By the fourth clause of his will, the testator devised and bequeathed the bulk of his real and personal estate to his executors, in trust for the uses and purposes specified in his will. By the fifth clause the testator ordered his executors to continue in operation for the benefit of his estate, the Ida Mills, during the two lives of Carville and Marshall, and of the survivor of them; or, so long within that period as, in their opinion the same could be done without material injury to the interests of his estate, and of those participating in the income thereof; and to distribute and appropriate the net annual income or profits thereof, as follows: One-half thereof to be divided and paid over in equal shares to the American Bible Society, the American Home Missionary Society, and the American Tract Society; and the other half thereof to be expended in supporting and maintaining the Marshall Infirmary.

This court has heretofore decided that this provision in effect created a trust in the executors; that such a trust is void under our statutes; but that the provision, at least as to a certain portion of the beneficiaries, could be enforced as a power in trust; that it was inoperative in regard to the distribution of the income, as to the three benevolent societies first mentioned, between whom one-half of the income was to be divided, by reason of their incompetency to take real estate or to participate in the rents and profits thereof; and that by reason of such invalidity, the legal title to said one-half of said real estate vested in his heirs at law, John W. Downing and James Marshall. That the provision as to the other half of the income for the benefit of the Marshall Infirmary was valid, that institution being competent to take real estate and to participate in the rents and profits thereof.

By the sixth clause of the will the testator directed his executors on the death of said Carville and Marshall, to convert into money or otherwise dispose of, in their discretion, the said Ida Mills, and to distribute and deliver over the moneys arising

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therefrom to the several legatees, and for the objects named in the fifth clause of the will, and in the same proportions as the income thereof was in said fifth clause directed to be distributed.

This court held that this provision being virtually a conversion of the real estate into personalty, could be carried into effect, and that all the legatees and beneficiaries before named would be entitled to their distributive share thereof in the proportions specified by the testator, except the one sixth bequeathed to the Home Missionary Society, which being incompetent to take either real or personal property, said one-sixth devolved on the heirs at law.

The questions supposed to have been left undecided, or to require a reargument, and now to be determined, are :

First. Whether the power in trust covers the entire interest and estate of the testator in the Ida Mills, or only so much as to which, in regard to the application of the rents and profits, it is held to be valid and effectual—that is, whether it does or does not cover that part, as to which, in consequence of the construction given to the will, the title descended to the heirs at law.

Second. Whether, if it may legally comprehend the entire property, the management of the Ida Mills is vested, by the joint operations of the testator's will and the provisions of law, exclusively in the executors or trustees named in the will, or conjointly in the executors and heirs at law.

The testator intended that the power of management and superintendence of the Ida Mills, should be exercised by his executors, and by them alone. He also intended that one-half of the income should be shared by the Bible Society, the Tract Society, and the Home Missionary Society. In this latter particular his intentions have been defeated, because they were illegal. The first question then would be, should the whole provision be set aside, because in part it can not be carried into effect? This court has decided otherwise; and that the provision shall be preserved so far as it is legal, and defeated only for the residue. This court has further decided that the power in trust is to be preserved. To what extent? So far as it may be legally and consistently done. The next question is, how far is this power to be deemed operative—to what extent

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can and ought it to be carried—can the power be preserved over the whole property, as well that which descends to the heirs, as that which is preserved for the legatees in the will. The law is that a trust, failing as such because not coming within the lawful enumerated class, may still be preserved as a power in trust, if directing or authorizing the performance of an act which may be lawfully performed under a power. 1 R. S. 729. May the act in question be lawfully performed under a power? What is the act to be performed, according to the plaintiff's claim? It is, in effect, a direction to the trustees to manage the mills during the lives of Carville and Marshall, and divide the income between the heirs at law, on the one side, and the Marshall Infirmary on the other—one-half to each. It is not the case of property held by the testator and heirs at law as tenants in common, of equal moieties, where undoubtedly the testator could not fasten a trust, or a power in trust, upon the land which would interfere with the absolute right of the heirs to control their moiety of the estate, and the rents and profits thereof. But the heirs at law get their title from and under the testator, and not independent of him, and they must take the estate, *cum onere*, with the burden of the power impressed upon it. It is rather as if the testator had devised the whole property to the heirs at law, subject to a power in the executors to manage and operate the same for two lives, and divide the net income between the Marshall Infirmary and the heirs at law; and after the expiration of the two lives, to sell the property, and divide the proceeds between the Marshall Infirmary and two of the benevolent societies, and the heirs at law. Would such power be valid? Or, in stricter analogy to the present case, suppose the testator not to have made (as he has not) any effectual disposition of the fee of these lands; but to have directed his executors to operate the mills and divide the net income equally between the Marshall Infirmary and the heirs at law.

This court has already held the power valid, as to the Marshall Infirmary. Is it not equally valid as to the heirs at law? Clearly it would have been so, if they had been expressly named in the will as the recipients of a moiety of the rents and profits. Is it less so because they came in as substituted

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parties, in place of others named in the will, who can not by law take the rents and profits? I think if the power had been thus drawn out in form in the will, it would have been valid within the decision of this court, so far as already made on the former occasion.

It is said this can not be done, because, by operation of law the will of the testator is defeated as to a moiety of the real estate and the rents and profits thereof; that the trust is void as to the whole property; and the power void as to such moiety in regard to the recipients of the rents and profits, and that, therefore, as to such moiety, the case must be treated as if there were neither a trust nor trust power in relation thereto; and at all events, that as the intentions of the testator have been frustrated, both as to the trust and the beneficiaries of the trust in regard to one moiety of the property, the main object of the provision is defeated, and the whole scheme of the testator as to this moiety should fall to the ground. I can not concur in either of these propositions. The trust power in relation to this one moiety of the property is not wholly defeated, either in fact or according to the presumed intention of the testator. It is defeated as to the recipients of the rents and profits; but not as to the power of management. In itself such power is lawful, though as to his moiety not exercised for the benefit of the persons intended by the testator. This does not invalidate the power itself. It is still a lawful power. It is a power to manage real estate and pay over the rents and profits to third persons. Suppose the testator had created this power of management over the whole property, with directions to pay over a moiety of the net income to the Marshall Infirmary, and without any directions whatever as to the other moiety. Would this have invalidated the power or simply left the other moiety of the income to be paid over to the residuary devisees, or the heirs at law?

Nor is it fair to presume that the main interest of the testator is sacrificed in regard to the maintenance of the power, because it is defeated as to the recipients of one moiety of the rents and profits. The power is single and entire, and we may well presume it would by him be desired to be maintained for the benefit of the recipient of the other moiety of the rents and

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profits, to wit: The Marshall Infirmary. The mills were a single interest, and the testator may well have supposed they would be more judiciously and profitably managed under the sole superintendence of his executors, than under the joint superintendence of themselves and the heirs at law. The interests might be conflicting, or supposed to be so, by parties not acting necessarily in concert, and under the influence of discordant councils, the business might be stopped. A partition or sale might be applied for, and the leading object intended by the testator to be accomplished through a union of views and of interests might be defeated. The testator designed that the power should be preserved entire, and as he says, "for the benefit of his estate," and the operations were to be continued or suspended according to the judgment of his executors, and no one else, and it was left to their judgment whether the operations could be continued beneficially to the interests of his estate, and of those (whoever they might be) participating in the income thereof.

This view, though discarded by Judge MARVIN, in reference to the power we are now considering, is enforced and applied by him in the case of the power to sell in the next clause of the will. There the land is directed to be sold after the expiration of two lives, and he holds the power valid and effectual for the sale of the whole property notwithstanding as to one-sixth thereof, not only the legal title but the proceeds of the sale vested in the heirs at law, on account of the disability of the Home Missionary Society to take either real or personal property. Here the intention of the testator, equally as in the other case, was in part defeated. The Home Missionary Society wholly failed to receive any portion, either of the rents and profits, or of the ultimate proceeds of the sale. Nevertheless, he held (and the court with him), and as, I think, correctly, that the power being valid, and its leading object the sale of the property and the distribution of the proceeds; that object should be effectuated, and the interest of the heir-at-law, as it was derived from the testator made subordinate to the leading purpose which the testator designed to accomplish. It was upheld under the rule laid down in *Williams on Executors*, 417, and the cases there cited, that when the purposes of

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the testator require a sale of the whole land, and there is only a partial disposition of the produce, the sale is to be made, and the heir will take, as money, the part undisposed of.

I adopt the conclusion just announced with less hesitation, not only because I suppose it consistent with the rules of law, and with the presumed intention of the testators, but with the best interests of the testator's estate, and of those who will take the same. The Ida Mills, I am persuaded, will be better managed under the superintendence of persons representing the whole estate, than under the joint management of parties having different, and, it may be, discordant interests. Matters are not so likely to proceed harmoniously in the latter contingency, and difficulties and disagreements may arise which will prove irreconcilable. I am persuaded the interests designed by the testator to be specially protected, will be better subserved by this course, and this, though a subordinate, is an additional reason for accepting this view of the case.

I think a clause should be inserted in the decree, that the power of management and superintendence, under the fifth clause of the will, extends over the whole Ida Mills property, as well that of which the interest is vested in the heirs-at-law as the residue; and that such power resides in and is to be exercised by the executors or trustees exclusively, and not by them jointly, or in common with the heirs-at-law.

A majority of the judges concurred.

Motion to amend judgment granted, without costs.

The clause of the judgment was modified to read as follows: *Ninth*, that the said heirs-at-law take the one-half of the net annual income and profits of the said last mentioned real estate, during the execution, by the trustees, of said power in trust, and, subject to the power in trust to convert the said last mentioned property into money on the death of both said Joseph Marshall and said Joseph Marshall Carville; and in the meantime, the said trustees *have the sole right of management of said property* real and personal, and such power resides in and is to be exercised by the trustees named in said will exclusively, and not by them jointly or in common with the heirs-at-law.

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ACCORD AND SATISFACTION.

Defendants, being insolvent, agreed with plaintiffs and certain other creditors, to transfer property consisting of stock in trade and book accounts of uncertain value, to trustees, to dispose of it and pay all their debts *pro rata*; and plaintiffs agreed, in consideration of defendants making such transfer, to release them from all indebtedness. Defendants performed their part of the agreement, and put the trustees in possession of the property. *Held*, these facts, without proof that plaintiffs accepted the assignment, constituted an accord and satisfaction, and were a defense to an action by plaintiffs on the original indebtedness. *Therasson v. Peterson*, 396.

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ACTION.

1. It is a general principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. *Rawls v. Deahler*, 12.
2. For a breach of an agreement to let land on shares, the occupant or farmer may maintain an action

immediately, without awaiting the expiration of the term. *Taylor v. Bradley*, 363.

3. In an action of a legal nature to recover premises leased forever, subject to a rent charge, upon the ground of a breach of the condition to pay the rent, if defendant pleads an extinguishment of the rent charge by a technical legal merger, the plaintiff may show that in equity no merger has taken place. *Sheehan v. Hamilton*, 211.
 4. Under the Code of Procedure, in such a case, the plaintiff need not bring a separate equity action to have the rent charge declared subsisting. The whole controversy may be decided in the ejectment suit, notwithstanding the facts relating to the alleged merger would have been, before the Code, of equitable cognizance. *Id.*
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1. Where a widow, having recovered in an action of ejectment for dower, applies to have her dower admeasured, notice to all owners of the freehold is not essential. *Stewart v. Smith*, 306.
2. The case is governed by 2 R. S. 303, 312, §§ 55, 57, and not by 2 R. S. 488, § 2; and notice to the attorney of the parties to the action, is sufficient. *Id.*

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1. An amendment of a complaint on a certificate of indebtedness issued by a municipal corporation, by alleging instead that the debt was due for services, is not a change of the cause of action, within the rules restricting amendments at the trial. *Woolsey v. Village of Rondout*, 639.
2. In an action for partition, the court have power, by amendment after judgment, to allow the insertion of the name of a party in the copy summons filed, and of a verification to a petition for the appointment of a guardian *ad litem*. *Van Wyck v. Hardy*, 496.
3. Even without amendment, the omission of the name and of the verification are not fatal to the judgment. *Ib.*
4. This court will not direct the court below to amend its order by stating that the reversal was on questions of fact, though it appears from the opinion of the court below, that it was the *intention* to reverse on those findings, if the order of reversal fails to express that intent. *Thompson v. Menck*, 400.

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1. An order referring the cause for trial is not an order involving the merits, and necessarily affecting

the judgment, within section 329 of the Code of Procedure, so as to be reviewable on a mere appeal from the judgment. *Van Marter v. Hotchkiss*, 484.

2. An order of the supreme court affirming a surrogate's order refusing leave to discontinue an accounting, and directing the hearing to continue—since it is not a final order, is not appealable to this court. *Tompkins v. Soulice* 421.
3. An order punishing a party to an action as for contempt, by imposing a fine for the indemnity of the party injured through his refusal to obey the order of the court, and by imprisonment to compel obedience, is appealable to this court. *Sudlow v. Knox* 326.
4. Such an order is not a proceeding in the action, within the meaning of subd. 2 of section 11 of the Code of Procedure,—which allows appeals from "an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken," &c.,—but is a final order affecting a substantial right, "made in a special proceeding," within the meaning of subd. 3. *Ib.*
5. Such an order will not be reversed by this court, merely because it does not affirmatively appear from the appeal papers that proof of the misconduct was made by affidavit, and due notice given. *Ib.*
6. An order of court, directing that the plaintiff may discontinue an equitable action without costs, is not reviewable in the court of appeals. *Staiger v. Schultz*, 293.
7. An appeal lies to this court, from an order of the general term, made upon appeal from the special term, vacating an attachment after judgment recovered in the action. *Wright v. Rowland*, 649.
8. It is not necessary that an order reversing an order made on special motion, founded on affidavits, should state that the reversal was on a question of fact. The provision of section 268 of the Code, that a reversal at general term shall not be deemed to have been on

- questions of fact unless so stated, does not apply to such orders. *Williams v. Hernon*, 611.
9. An appellant can not, on appeal, for the first time object that the court directed verdict for the defendant, when there was a question for the jury. A request to submit the question to the jury must be made at the trial. *Seymour v. Cowing*, 200.
 10. This court will not reverse a judgment on the report of a referee, unless the findings of fact show affirmatively the error on which the appellant relies. *Rice v. Isham*, 87.
 11. This court can not review a decision of the court below, affirming the judgment of a referee, on a question of fact, unless he decided without evidence or against all evidence. *Wiltsie v. Eaddie*, 624.
 12. Upon an undertaking on an appeal taken by two appellants, that "if the said judgment appealed from, or any part thereof, be affirmed, the said appellants will pay the amount," the sureties are liable if the judgment is affirmed against one appellant, though reversed as to the other. *Seacord v. Morgan*, 172.
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The actual submission of a contested claim to the surrogate, all the parties in interest being present, can not be sustained as an arbitration. *Tucker v. Tucker*, 428.

ARREST.

- A violation of a municipal ordinance is not necessarily a felony or misdemeanor, within rule 28 of the Metropolitan Police Board, and will not justify the imprisonment over night, of a person charged therewith, but he should be taken immediately before a magistrate. *Schmeider v. McLane*, 154.

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ASSIGNMENT.

1. A contract to plant a certain area of land, and sell all the crop raised, is assignable by the buyer, without assent of the seller. *Sears v. Conover*, 179.
 2. If the seller in such a contract, sells the crop to a third person, and avows to the other party having done so, and refuses to perform, before the time fixed for performance, this is a breach without further demand. *Ib.*
 3. A court of equity will uphold an assignment of a bare possibility or expectancy.—*e. g.*, that of an heir apparent in the estate of his living ancestor,—when made in good faith, and for value, or to secure a precedent debt. *Stover v. Eycleshimer*, 309.
 4. A power of attorney containing words showing an intent to vest an interest, is sufficient as an assignment, within this rule. *Ib.*
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ASSIGNMENT FOR BENEFIT OF CREDITORS.

An assignment direct to creditors, to secure to them their particular demands, is not an assignment in trust, and is not void as creating a trust for the grantor, contrary to 2 R. S. 135, § 1. *Van Buskirk v. Warren*, 457.

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Property seized on an attachment issued as a provisional remedy, is held to meet the ultimate recovery in the action, not merely to meet such judgment as may first be recovered. Hence, pending plaintiff's appeal from a judgment awarding him only part of his claim, defendant is not entitled to have the attachment va-

cated on payment of such part.
Wright v. Rowland, 649.
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BAILMENT.

Personal property, in the possession of a bailee having a lien thereon, can not be taken from his possession on attachment against the bailor. *Truslow v. Putnam*, 425.

BANKING.

1. Where a person indebted to a bank, in order to protect the bank, made the cashier thereof, as such, his attorney to collect certain dues to him, and the cashier, at the same time, undertook, by an instrument in which he signed himself "cashier of the Farmers' and Mechanics' Bank," to pay the debtor.—certain moneys from the proceeds; *Held*, that an action would not lie on the instrument so signed against the cashier as an individual (after he had ceased to be an officer of the bank). *Barbour v. Litchfield*, 655.
 2. An order on a bank to deliver securities or pay proceeds, if collected, is paid by crediting payee in account, and paying his checks. *Weedsport Bank v. Park Bank*, 545.
- CORPORATION, 2; PAYMENT, 3; RELIGIOUS CORPORATION, 2.

BILL OF LADING.

1. Under a bill of lading for the carriage of goods from San Francisco to New York, to be shipped from San Francisco to Panama, forwarded across the isthmus and reshipped thence to New York, the carrier, if admitted to have been a carrier between the termini, is chargeable as such for a loss upon the isthmus. *Simmons v. Law*, 241.
2. If by the fair construction of the bill of lading he would be thus liable, evidence is not admissible, that there was a custom of shippers, known to the owner, to insure on the isthmus, and of carriers to refuse to be liable as such on the isthmus. *Ib.*
3. An owner of merchandise who, by intrusting it to a purchaser on a conditional sale, enables the purchaser to ship it and obtain a

negotiable bill of lading, loses his title to the merchandise as against a bona fide purchaser or pledgee for value of the bill of lading. *Rawls v. Deshler*, 12.

4. The fact that the order by which the seller gives possession to the purchaser, under the executory sale, contains a clause stating that the merchandise is subject to the seller's order until paid for, does not prevent the title from passing *Ib.*
5. Nor does it alter the case that the instrument assigned or pledged as a symbol of the property is not strictly a bill of lading. *Ib.*
6. The owner of a vessel, in an action brought by him for freight money against the assignee of a bill of lading which the owner has signed, is estopped from setting up a state of facts different from that which he has set forth in the bill of lading, and relying upon which the assignee has paid for the property described therein. *Byrne v. Weeks*, 657.
7. In such an action where the quantity of goods of one description in the cargo had exceeded, and of another had fallen short of the amount stated in the bill of lading, and the assignee thereof had accepted and received such portion of the former class as the bill of lading called for, and the whole of the latter class on board, (or as much of each as the master of the vessel would deliver unless he took goods not covered by the bill of lading). *Held*, that he could set up a counter-claim for damages for the non-delivery of the residue of the quantities specified in the bill of lading, not actually received. *Ib.*
8. And the fact that he was aware of the variance after a part and before the whole of the goods accepted by him were received, does not deprive him of this right. *Ib.*
9. Nor does the receipt of such part of the cargo by the assignee work acceptance of the goods not enumerated in the bill of lading, nor render him liable for freight upon the whole cargo, but only for freight upon the portion actually received by him under the bill of lading. *Ib.*

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BILLS, NOTES AND CHECKS.

1. Defendant adopted a corporate name in which to carry on business, and authorized an agent to draw bills on his factor, and subsequently transferred the business to a company organized under that name. *Held*, that he was liable to the factor for money paid on bills drawn in the same name, by the agent, after the transfer, and paid in good faith, and without notice of the transfer. *Rice v. Isham*, 37.
 2. An indorser of a *non-negotiable* note may be held as maker, and is not entitled to demand and notice. *Richards v. Warring*, 47.
 3. The wrongful detention of negotiable paper, in a sister State, by a person who claims title under a forged indorsement, does not, either in equity, or under the statute as to lost paper, entitle the true owner to recover against the drawer, without producing the paper. *Van Alstyne v. National Commercial Bank*, 449.
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Under the building association act (*L. 1851, p. 234, ch. 123, § 3*), it is not necessary that the copy of the articles to be filed should be signed by the trustees, for they are not officers, within the meaning of the statute. *Second Manhattan Building Ass. v. Hayes*, 183.

BUILDING CONTRACT.

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CARRIER.

1. Where an agent or carrier was authorized to receive merchandise to transport to the buyer, delivery
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by his direction on board the barge of another person, was held sufficient to charge the purchaser. *Thompson v. Menck*, 400.

2. The decision in *Williams v. Vanderbilt*, 28 *N. Y.* 217, affirming 29 *Barb.* 491, that a part owner of one of several connecting lines may be held liable as carrier over the whole route — reasserted. *Ward v. Vanderbilt*, 521.

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CAUSE OF ACTION.

It is a rule in equity, not affected by the Code of Procedure, that a party must recover according to the case made by his complaint, or not at all; *secundum allegata* as well as *probata*. No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some parts of the pleadings and evidence. *Rome Exchange Bank v. Eames*, 83.

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A judgment confessed by a married woman is not void, but voidable

merely; and her husband, if he assented to the sale of property on the execution thereon, is estopped from afterwards claiming it adversely. *Roraback v. Stebbins*, 100.

CONGRESS.

Either house of Congress may issue its warrant or attachment to bring before it, for the purpose of giving necessary evidence in legislative proceedings, a witness charged with contempt, and by such process may take him from the custody of the sheriff by whom he is imprisoned on execution in a proceeding in a State court. Congress is not restricted to proceeding by *habeas corpus* in such cases. *Wilckens v. Willet*, 596.

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The word "consigned" implies agency, not ownership in the consignee. *Rolker v. Great Western Ins. Co.*, 76.

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CONTEMPT.

1. It is not a contempt for a party, required to produce his books before a referee, to refuse to leave the books with the referee, if the order under which the referee acts only requires the production of the books. *Sudlow v. Knox*, 226.
2. Whether it is competent for the court to order the books of a party to be left with the referee for the purpose of an accounting,—*query?* *Ib.*
3. It is a contempt for such party to refuse to obey the referee's order that he allow a witness, while testifying, to examine the books, to enable the adverse party to question him thereon. *Ib.*
4. In proceedings as for contempts to enforce civil remedies, under 2 R. S. 534-538, — section 21 of which authorizes the court to impose a fine to indemnify a party

for actual loss and injury, and to satisfy his costs and expenses,—the costs and expenses must be ascertained by the rate of compensation fixed by statute for the services performed. *Ib.*

5. The amount of the fine to indemnify for the other loss and injury, must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for such damages. *Ib.*
6. The court can not for either purpose summarily fix a gross sum in its discretion. *Ib.*

APPEAL, 3; CONGRESS.

CONTINGENT REMAINDER

DEED, 4; REMAINDER.

CONTRACT.

1. After verbal negotiations, defendant wrote to plaintiff referring to the merchandise as having been bought of him, and directing a delivery. *Held*, that this being accepted by plaintiff, was a sufficient contract within the statute. *Thompson v. Menck*, 400.
2. One who, pursuant to verbal agreement with another, purchases land, for the benefit of the latter, and advances the price and takes a conveyance in his own name, can not interpose the statute of frauds to defeat the claim of the other to enforce the trust arising from the transaction. *Sandford v. Norris*, 144.
3. An agreement to let a farm for a term of years, each party to furnish part of the tools, materials, &c., and one to cultivate it and have certain supplies, after which all products are to be equally divided—may be regarded, neither as a mere lease nor as a contract for services, but as a special contract, partaking the nature of an adventure. *Taylor v. Bradley*, 363.
4. The measure of damages on a breach, by the owner or lessor is, the value of such privilege of occupying and working the farm, subject to the conditions of the agreement, and under all the con-

tingencies that are liable to affect the result. *Ib.*

6. Whether plaintiff hired another farm, in consequence of being refused possession under the contract, and, if so, what it cost to remove thither, are not relevant questions; and it is error to limit his recovery to the expense of such removal. *Ib.*

6. Whether the value of such a contract may be proved by the opinions of witnesses,—*Query?* *Ib.*

7. An instrument not under seal,—*e. g.*, a promissory note,—may be delivered to the party in whose favor it is drawn, upon a condition; so that until performance of the condition he acquires no right to enforce it. *Seymour v. Cowing*, 200.

8. A clear, certain and distinct contract is not liable to modification by proof of custom. *Simmons v. Law*, 241.

9. An ambiguous policy of insurance is to be construed liberally in favor of the insured. *Rolker v. Great Western Ins. Co.*, 76.

10. Where, during the performance of a contract, the contractor is prevented from proceeding by an obstacle which can not be removed without the payment of money,—*e. g.*, by the necessity of a license from the public authorities to allow part of the work to be done,—the contractor can not, without request from the employer, pay the expense and recover it from the employer in an action for money paid. *Thorp v. Ross*, 416.

11. Under a building contract, the owner does not, by taking possession of the building, without complete performance, necessarily waive his right to enforce a forfeiture for a defect in the performance. *Reed v. Board of Education of Brooklyn*, 24.

12. One of several associates, having employed plaintiffs to do work for the benefit of all, and having accounted with his associates on the basis of assuming and being credited with payment of what is due to the plaintiffs, is liable to plaintiffs therefor, without his associates being joined in the action. *Secor v. Law*, 188.

13. In an action on the contract, an amendment of the complaint neces-

sary to make this ground of liability appear, may be allowed by the referee at the trial. *Ib.*

ASSIGNMENT, 1; BANKING; CORPORATION, 3; COUNTER-CLAIM, 1; EVIDENCE, 4, 11, 24; GUARANTY; JUDGMENT, 3; INSURANCE, 10; PARTNERSHIP, 1; REFORMATION OF INSTRUMENT, 1; RELIGIOUS CORPORATION, 1; SALE, 1, 2, 6; USURY, 4.

CONVERSION.

DEFENSE, 2.

CORPORATION.

1. By common law, and in the absence of statutory prohibitions, corporations, in whatever manner created, could take by all the usual methods of acquiring property. By the statute of wills (§ R. S. 57, § 3), they are now prohibited from taking lands by devise, unless expressly authorized by their charters or by statute, but they may still acquire personal property in any manner. *Sherwood v. American Bible Society*, 227.

2. A purchase of lands by a bank cashier, for the benefit of his bank, is not necessarily invalid because the bank by its charter is disabled from purchasing lands. *White v. Lester*, 585.

3. A person who has dealt with a corporation de facto, can not avoid liability to it on the contract, by questioning the validity of the organization. *White v. Ross*, 589.

4. An act of the legislature recognizing the existence of a corporation,—*e. g.*, changing its name—cures irregularities in its organization. *Ib.*

BANKING; BUILDING ASSOCIATION; EVIDENCE, 28; JOINT STOCK CO., 1; INSURANCE, 17; RAILROAD CO., 1; RELIGIOUS CORPORATION, 1, 2; USURY, 4; VILLAGE, 1.

COSTS.

In actions of an equitable nature—*e. g.*, for an injunction—it is discretionary with the court in which the action is brought to grant or

refuse costs. The amendments to the Code of Procedure, passed in 1862, did not affect this rule. *Staiger v. Schultz*, 293.

COUNTER-CLAIM.

1. In an action by several plaintiffs, on a contract, for an accounting, if the contract itself divides the fund, and makes a specific share due to each,—a cause of action in favor of the defendants against one of the plaintiffs, though it could not be set up to bar the right to an accounting, is a proper counter-claim against the share of the plaintiff whom it affects. *Taylor v. Root*, 382.
2. In such a case the claim of the plaintiffs is several, within the meaning of the Code. *Id.*

BILL OF LADING, 7; JUDGMENT, 2.

COUNTY.

A person convicted of murder, before sentence was passed, was found to be insane, discharged from imprisonment, and sent to the State lunatic asylum; his expenses there were paid by the treasurer of the county from which he was sent. *Held*, that the supervisors of the county could recover from the committee of the criminal's estate the amount so advanced, it being proved that such committee held property of the criminal more than sufficient for the purpose. *Supervisors of Onondaga County v. Morgan*, 335.

COURT.

INSURANCE, 20.

COVENANT.

ESTOPPEL; LANDLORD AND TENANT, 3.

CREDITORS' ACTION.

1. A creditors' action, by several judgment creditors, seeking to set aside several fraudulent conveyances made by the debtor, at various times and to various persons, and to subject the property to the executions of the plaintiffs, and to render an assignee in trust personally liable,—states but one cause of action; and the various transferees

may be joined as defendants, although there was no privity between the transferees. *Reed v. Stryker*, 26.

2. To sustain a creditor's suit against one of several joint debtors, the legal remedy must first be exhausted against all of them, including the estate of any one that is alleged to be deceased. *Voorhees v. Howard*, 503.
3. A creditor, with judgment and execution unsatisfied, filing a bill to set aside a fraudulent conveyance or assignment, may follow the property which was the subject of the fraud into the hands of any person but a *bona fide* purchaser; and if it has been transferred to a *bona fide* purchaser, &c., he may have a decree for the proceeds against the party who was privy to and profited by the fraud. *Warner v. Blakeman*, 530.
4. If such party has sold the property at an advanced price, he may be held liable for the increased value; but he is not liable for rents and profits. *Id.*

FORECLOSURE, 3; JOINT STOCK CO., 2.

CROPS.

HUSBAND AND WIFE, 2.

CUSTOM.

BILL OF LADING, 2; CONTRACT, 8.

DAMAGES.

1. The damages for a factor's selling in violation of instructions, may be ascertained by referring to the net market price of the goods, at a reasonable time afterward, within which to commence the action. *Scott v. Rogers*, 157.
2. What is a reasonable time, is a question of fact. *Id.*
3. In awarding damages against a carrier for neglect to transport a passenger according to contract, the jury may allow a reasonable compensation for the time lost by plaintiff, though no specific evidence of its value has been adduced. *Ward v. Vanderbilt*, 521.

ACTION, 1; CONTEMPT, 5; CONTRACT, 4; EVIDENCE, 22, 32; NEW TRIAL, 2; PARENT AND CHILD.

DATE.

RAILROAD CO., 2.

DEBTOR AND CREDITOR.

ACCORD AND SATISFACTION; MORTGAGE, 4; PAYMENT, 1.

DECEIT.

EVIDENCE, 5, 18.

DEED.

1. A deed of land is not rendered invalid by the fact that a consideration is not paid; and where after executing and delivering a deed to A., without actual payment of the consideration, the grantor executed a second deed of the same land to B., who had actual knowledge of the prior deed, but recorded his deed before the prior deed had been recorded, and, after the prior deed had been recorded, B. conveyed the land for a valuable consideration to C., who had no actual notice of the prior deed,—*Held*, that C. occupied no better position than B., and that the grantees in the first deed could recover possession of the land. *Ring v. Steele*, 68.
2. Course and distance, in the description in a deed, do not control, where the land can not be plotted from the deed. *Ratcliffe v. Cary*, 4.
3. A deed of trust, for the payment of the grantor's debts generally, should be confined to debts existing at the time when the deed was made. A debt subsequently originating is not entitled to payment out of the trust estate. *Rome Exchange Bank v. Eames*, 83.
4. Under a deed of lands to A. for life, and after his death, then to his heirs and assigns for ever, the children of A. during his life have a vested future estate in remainder, which is not made contingent by the fact that it is liable to be defeated or modified by death of any of them, or the birth of other children during his life. *Sheridan v. House*, 218.
5. An action lies by the receiver of the property of the grantor in a warranty deed, against the grantee in such deed, to prove that the deed, though absolute in its terms,

was in fact a security in the nature of a mortgage. *Van Dusen v. Worrell*, 473.

6. In such an action the plaintiff may recover the price for which the grantee has sold the land, deducting the amount due the grantee, and a reasonable compensation for his trouble in effecting a sale. *Id.*

PARTITION, 1; RELIGIOUS CORPORATION, 2; TRESPASSER; WITNESS, 3.

DEFENSE.

1. Deceptive conduct in obtaining part payment of a debt already due, is deemed no defense to an action for the balance. *Thompson v. Menck*, 400.
2. A firm of warehousemen delivered to third persons, as being the property of L. wheat belonging to a firm of merchants, and the latter sued the transferees for conversion. *Held*, that the fact that L. was a member of both firms, was no defense. *Wright v. Ames*, 644.

DELIVERY.

CARRIER, 1; CONTRACT, 7; EVIDENCE, 2; SALE, 2.

DEMAND.

ASSIGNMENT, 2.

DEVISE.

CORPORATION, 1.

DISCONTINUANCE.

APPEAL, 2, 6.

DOWER.

Where dower was to be assigned in a building used as a dwelling-house and store, and the commissioners set it off by running lines through the premises, regardless of rooms, closets, passage ways, &c., so as to render a portion of the building useless,—*Held*, that the report of the commissioners could be vacated, on motion of the owners of the property. *Stewart v. Smith*, 306.

ADMEASUREMENT OF DOWER, 1.

DRAINS.

HIGHWAYS, 2.

EJECTMENT.

1. *It seems*, that ejectment lies for a room, although the walls have been so altered as to destroy its identity. *Rowan v. Kelsey*, 125.
2. The Code abrogates the provision of 2 R. S. 304, § 11, which allowed in ejectment (except when brought for dower), several persons to be named as plaintiffs, jointly in one count, and separately in others. *St. John v. Pierce*, 140.
3. A complaint framed so as to take full advantage of this section of the revised statutes is, under the Code, obnoxious to a demurrer, both for misjoinder of actions and misjoinder of parties. *Ib.*

ACTION, 4; ADMEASUREMENT OF DOWER, 1; HUSBAND AND WIFE, 2.

EQUITY.

REFORMATION OF INSTRUMENT, 1.

ERROR.

TRIAL, 1.

ESCAPE.

The removal of a prisoner having the liberties of the jail, from the limits thereof by virtue of a valid legal process which affords justification to the officer taking him thence, is not an escape within 2 R. S. 437, § 63. *Wilckens v. Willet*, 596.

ESTOPPEL.

The doctrine of estoppel by warranty applied. *Sheridan v. House*, 218.

BILL OF LADING, 6; CONFESSION OF JUDGMENT; CONTRACT, 2; EVIDENCE, 25; MORTGAGE, 3.

EVICTION.

LANDLORD AND TENANT, 1.

EVIDENCE.

1. Upon an assignment made direct to a party having a beneficial interest under it, the presumption is that he accepts it. Affirmative proof of acceptance is not required, but the party impeaching it

must disprove acceptance. *Van Buskirk v. Warren*, 457.

2. A transfer of chattels is not absolutely void as against creditors if unaccompanied by an immediate change of possession. Want of delivery raises a presumption of fraud, and the burden of proof to rebut the presumption is on the party claiming under the transfer. *Ib.*
3. Parol evidence is admissible to show that notes received by one party in exchange for notes given by him to the other were mere memoranda and not promises, and therefore formed no consideration for the notes he gave. *Seymour v. Cowing*, 200.
4. Parol evidence is not admissible to show that in the negotiations which led to the execution of a written building contract, it was verbally agreed that a disbursement necessary for part of the work should be made by the contractor. *Thorp v. Ross*, 416.
5. In an action by the seller to recover back goods from the possession of defendant, on the ground that the buyer, under whom defendant claims, procured the sale, on credit, by fraudulent representations, plaintiff may prove the fraudulent intent not to pay, either by direct statements shown to be untrue, or by circumstances tending to the same result. *Van Kleek v. Leroy*, 479.
6. A direct misrepresentation to the plaintiff having been proved, it is competent to prove similar fraudulent representations made to another person in a different transaction, as bearing upon the question of intent. *Ib.*
7. Such similar frauds, however, are not *alone* sufficient to sustain a recovery, even if it be shown that the representations were communicated to the plaintiff, and that he acted on the faith of them, unless it be also shown that the buyer, in making such representations, intended them to be so communicated. *Ib.*
8. In an action against a municipal corporation, to recover for services, for which the trustees had issued a certificate of indebtedness, the official character of such trustees may be proved by parol, without

- producing record evidence. It is sufficient for such purpose, to show that they were officers *de facto*. *Woolsey v. Village of Rondout*, 639.
9. A decree on a libel *in rem* against a ship, for supplies furnished her, does not necessarily determine the title to the ship; and therefore is not competent in a subsequent action, as evidence of the ownership of the supplies so obtained, without other proof of the title to the ship. *Van Vechten v. Griffiths*, 487.
 10. The report of a referee in a general creditor's action, to which the receiver and the company were parties, in which an account of all the debts and assets of the company was taken, showing that the assets were insufficient to pay the debts and expenses of collection, — is sufficient evidence to sustain an assessment, as against the maker of a premium note. *Sands v. Shoemaker*, 149.
 11. Where a verbal contract refers to a written instrument not as a contract, but as containing some of the terms of the parol contract, it is not necessary, in order to admit the writing in evidence in establishing the verbal contract to prove the execution of the writing, but identifying it is enough. *Smith v. N. Y. Central R. R. Co.*, 262.
 12. The rule requiring the production of a subscribing witness to prove the execution of an attested instrument, is not affected by the Code. *Weigand v. Siegel*, 592.
 13. In an action in which the question is whether a certain transaction was a sale of property, or a delivery to the defendant as agent of the plaintiff, it is competent to prove an entry made by the plaintiff, in his books, of the transaction as a sale, if accompanied by proof that the entry was subsequently read to the defendant, and he admitted its correctness. *Tanner v. Parshall*, 356.
 14. Upon such a question the jury can not consider the actual value or the unsoundness of the property, as a circumstance in connection with the price, bearing upon the question. *Ib.*
 15. Books of account are admissible in evidence though the items contained in them were noted on a slate in the first instance, if such items were transcribed on the books from day to day in the usual course of business. *Stroud v. Tilton*, 324.
 16. The right of a party to use his books as evidence is not abrogated by the statute authorizing him to testify as a witness in his own behalf. *Ib.*
 17. Where a married woman was the owner of a farm, and was proved to have been possessed of some personal property beside, and her husband was shown to have been very destitute of funds, — *Held*, that there was sufficient proof to warrant the inference that the tools and stock on the farm were purchased with her separate property, even though the farm was carried on by her husband. *Vrooman v. Griffiths*, 505.
 18. In an action for deceit whereby the plaintiff was induced to abandon his professional practice in one place and remove to another place, and enter into partnership with the defendant, it is competent for the plaintiff to testify as to the value and growing character of the abandoned practice, not to affect the damages, but to show his reliance upon the defendant's representations. *Thorn v. Helmer*, 408.
 19. Whether he believed the defendant's representations is a question of fact, upon which he may testify. *Ib.*
 20. Evidence as to the amount of professional business done by both plaintiff and defendant during the year they practiced together as partners, is admissible to show presumptively that the defendant greatly misrepresented his practice during the preceding year. *Ib.*
 21. It is competent to show the worth of a house and lot for which the plaintiff paid far more than it was worth, as tending to show the plaintiff's belief in the defendant's representations as to the amount of his practice. *Ib.*
 22. It is also admissible as affecting the question of damages. *Ib.*
 23. The testimony of a physician, practicing in the place, as to his knowledge of the number of cases

- of fracture existing at one time in such place, is competent to show the falsity of the defendant's representations as to the number of such cases that he had had at one time. *Ib.*
24. An agreement with the defendant at the end of the first year of the partnership, to dissolve the partnership and allow the defendant to continue in practice in the place, in no way released the defendant from any liability he was under for his false representations. *Ib.*
25. In ejectment, by a lessee against his lessor, to recover possession of rooms demised, which the landlord has altered so as to destroy their identity, if the answer denies the allegations of the complaint, that the acts were done by force and without plaintiff's consent, and alleges that plaintiff's tenancy had ceased, evidence that he induced, or assented to, the alterations, is admissible to prove an estoppel. If such an answer be not sufficient to admit this evidence, objection to the form of the pleadings must be taken at the trial. *Rowan v. Kelsey*, 125.
26. In an action against a carrier, under a complaint which alleges that before the arrival of the goods at their original destination, the consignee had left that place, and the carrier was directed to forward the goods from thence to him at another place, but that he neglected so to do, and so negligently acted that the goods were lost, — evidence that when the property had reached its destination, the consignee's agent demanded a delivery of it, which was refused by reason of the negligence of the defendant, the carrier—will sustain a recovery, there being no objection taken at the trial to the variance. *Rosebrooks v. Dinmore*, 118.
27. An objection at the trial might be obviated by amendment. *Ib.*
28. As against a simple trespasser, the facts that the plaintiffs have acted as trustees of a school district, and their predecessors had been for years in possession as such, of the school-house, is sufficient evidence of their incorporation. *Robie v. Sedgwick*, 73.
29. Where it is the usual course of business for a factor to accept bills drawn by his principal and return them to him, to be used for raising money as he pleases, the factor's possession of such bills bearing the blank indorsement of the principal, is sufficient *prima facie* evidence of ownership to enable the factor to recover from the principal the money paid thereon at maturity, in the absence of proof of an unlawful diversion. *Rice v. Isham*, 37.
30. Continuance of cohabitation, though it is conclusive evidence of condonation in case of adultery, and bars an action for an absolute divorce on that ground, is not conclusive in the case of an action for limited divorce on the ground of cruelty, &c. *Reynolds v. Reynolds*, 85.
31. Where a lapse of time, and the destruction of the monument given in the deed as the point of beginning, render the precise location uncertain, evidence of the existence of monuments, such as a line of marked trees, with circumstances under which the jury might believe that line to have been acquiesced in by the parties as a boundary for more than fifty years, makes the question of boundary one for the jury. *Ratcliffe v. Cary*, 4.
32. The defendants agreed with plaintiff (who had contracted to construct a railroad track parallel to that of defendants' road) that they would transport and distribute his material along the line, and charge him only the actual expense. In his action against them to recover for a breach of the agreement, — *Held*, that evidence of how much more it cost him to distribute the ties, &c., by laying a temporary track, was admissible; and this excess in expense was proper damages. *Wilson v. N. Y. Central R. R. Co.*, 618.
- ACTION, 3; BILL OF LADING, 2; CONTRACT, 8; DAMAGES, 3; HIGHWAYS, 1; INSURANCE, 13; NEW TRIAL, 1; PLEADING, 2; PRINCIPAL AND AGENT, 1; REAL PROPERTY, TRIAL, 1; UNDUE INFLUENCE, 1; USURY, 1; WILL, 2.

EXCEPTION.

TRIAL, 6.

EXECUTION.

A vested estate in remainder, although it be liable to be defeated by a subsequent event, is a legal estate, assignable and subject to sale on execution. *Sheridan v. House*, 218.

BAILMENT; CREDITORS' ACTION, 2; FORECLOSURE, 3; TAXES.

EXECUTORS AND ADMINISTRATORS.

1. The omission of the executor or administrator to offer to refer a claim, when presented, is not necessarily an admission of it, which precludes him from contesting it, and thus preventing its allowance by the surrogate, on an accounting. *Tucker v. Tucker*, 428.
2. In the absence of fraud or collusion between the administrator and the creditor, a surrogate's decree, directing the administrator to pay a debt, is conclusive on the sureties in the administration bond. *Thayer v. Clark*, 391.
3. After the liability of the sureties is fixed, the bond may be assigned to the creditor, and he may maintain an action thereon. *Ib.*
4. Under the Revised Statutes, which give compensation to executors in general terms, not providing for any apportionment among them upon equitable principles, if the surrogate could in any case apportion the commissions of coexecutors unequally, on the ground of inequality in the services rendered by them, where he fails to do so, each is entitled to an equal share, irrespective of the inequality of service. *White v. Bullock*, 578.
5. An administrator *de bonis non* can maintain an action against the personal representative of an executor who had died without applying assets collected, to compel an accounting and delivery of such assets. *Walton v. Walton*, 512.

ARBITRATION; LIMITATION OF ACTION, 2; SUSPENSION OF POWER OF ALIENATION; WILL, 3.

FACTOR.

Where a merchant directs his factors to sell merchandise on a certain day, at a fixed price, and if not sold, to ship it, the factors have no authority to make an offer, on the day named, to be accepted the next day, at the price specified. *Scott v. Rogers*, 157.

BILLS, NOTES AND CHECKS, 1.

FENCES.

RAILROAD CO., 3, 5.

FELONY.

ARREST.

FIXTURES.

REAL PROPERTY.

FORECLOSURE.

1. In a foreclosure suit, defendants, who do not set up any equities as against plaintiff, should not be allowed to litigate between themselves, before a judgment, the question of their priorities of right in the fund or their equities as to the order of sale of parcels of the property, but the plaintiff should have the usual judgment of sale. *Smart v. Bement*, 253.
2. A purchaser of land at its sale on the foreclosure of a junior mortgage can not recover possession against the owner of the equity of redemption of the prior mortgage in possession as such, although by the lapse of time the latter could not maintain an action to redeem. *Wells v. Pierce*, 559.
3. A regular foreclosure by advertisement, of a wholly void mortgage, —*e. g.*, a mortgage that has been paid and satisfied,—does not cut off the lien of judgment creditors, except, perhaps, to a *bona fide* purchaser of the land under the foreclosure, without notice; and such judgment creditors are not restricted to proceedings by execution in disregard of the foreclosure, but may proceed by a creditor's suit to reach the purchase money due from the *bona fide* purchaser to the mortgage creditor who made the fraudulent sale. *Warner v. Blakeman*, 530.

BAND AND WIFE, 2; INTERPLEADER; LOAN COMMISSIONERS, 2.

FOREIGN CORPORATION.

1. A foreign corporation is competent to take personality in this State, by bequest. Although it has no legal existence out of the State of its creation, its existence in that State may be recognized in this State; and its foreign residence creates no insuperable objection to its receiving a gift of money by will from a resident of New York, if it be authorized generally by its charter to take such gifts. *Sherwood v. American Bible Society*, 227.
2. *It seems*, that this would be otherwise if our own law forbade domestic corporations to take such donations. *Ib.*

FORFEITURE.

CONTRACT, 11.

FORMER ADJUDICATION.

EVIDENCE, 9.

FRAUD.

- CREDITORS' ACTION, 3; DEFENSE, 1; EVIDENCE, 2, 5; FORECLOSURE, 3; HUSBAND AND WIFE, 2; MORTGAGE, 4, 7; PLEADING, 2; REFORMATION OF INSTRUMENT, 1; SALE, 3; UNDUE INFLUENCE.

FREIGHT.

BILL OF LADING, 9.

GOOD WILL.

EVIDENCE, 18.

GUARANTY.

Where a non-negotiable note has been indorsed, the holder may overwrite the indorser's name with a contract of guaranty, or recover against him as a maker of the note. *Richards v. Warring*, 47.

HEIR.

ASSIGNMENT, 3; WILL, 3.

HIGHWAYS.

1. An order of commissioners of highways signed by only two,

and not reciting a meeting, &c., of three, or notice to a third, is void unless it affirmatively appears that the town had only two commissioners. It can not be presumed that there was not a third. *Simmons v. Sines*, 246.

2. The construction, beneath the streets of a city, of drains, by private owners, to connect their premises with the sewers, is not an unauthorized use of a highway, which renders the individual making it liable for all damages resulting. The liability of either the private owner or the city corporation, in such a case, depends on the question of negligence or improper construction of the drain. *Wendell v. Mayor, &c. of Troy*, 563.
3. If the corporation consented to the making of the drain under the supervision of their officer, and have agreed to exercise such supervision, they are liable to any third person injured by a defect in the structure. *Ib.*
4. The fact that the imperfection was of a secret or hidden character, does not exonerate them, if it might have been detected by proper supervision of the work. *Ib.*

HUSBAND AND WIFE.

1. The provision of the acts of 1848 and 1849, allowing a married woman to take by "grant" from any person other than her husband, empowers her (with her husband's assent) to take a mortgage payable to herself, for a debt which was due to both of them; and no one but the husband's creditors can impeach the mortgage on that account. *Wolfe v. Scroggs*, 634.
2. A wife's title to a farm, owned by her, and carried on by her and a minor son, was cut off by foreclosure; and, while she was holding over, in the absence of her husband, she sold crops, which she had harvested before judgment in ejectment against her brought by the purchaser at the foreclosure. *Held*, that in the absence of proof of fraud, the buyer of the crops acquired good title as against the purchaser of

the land at the foreclosure sale; and, as against the husband's creditors. *Van Etten v. Currier*, 475.

8. A wife does not, by employing her husband to carry on a farm, which is her separate property, render its proceeds, or chattels purchased by her to be used in connection with it, liable for his debts. *Prooman v. Griffiths*, 505.

CONFESSION OF JUDGMENT; WITNESS, 1.

IMPRISONMENT.

ARREST; INSANE PERSONS, 3.

INCONSISTENCY.

STATUTE.

INDEMNITY.

BILLS, NOTES AND CHECKS, 3.

INDICTMENT.

1. While an indictment remains in the same court in which it was found, a caption is not necessary. *Wagner v. People*, 509.
2. Where an indictment in a court of local jurisdiction alleges that the offense was committed in a city within its jurisdiction, the omission to give distinct proof that the place of committing offense was within the city is not ground for reversing a conviction if the objection was not taken at the trial. *Ib.*
3. So of the objection that the year in which the offense was committed was not expressly designated by the witnesses. *Ib.*

INJUNCTION.

COSTS.

INSANE PERSONS.

1. Where the evidence in a criminal case raises the question of insanity, the jury must be satisfied, beyond a reasonable doubt, that the prisoner was sane when he committed the act, but the test of sanity for this purpose is the knowledge of the difference between right and wrong. *Wagner v. People*, 509.
2. Under *L. 1842, 149, ch. 135, § 82*,

the committee of an insane convict, provided they have received sufficient funds, may be compelled to bear the expenses of his maintenance, clothing, &c., while in the State lunatic asylum. *Supervisors of Onondaga County v. Morgan*, 335.

3. An action to recover back such expenses may be maintained against the committee, by the county from which he was sent, and which has advanced the money for his support. *Ib.* COUNTY.

INSURANCE.

1. Under an open policy, reciting payment of premium at a specified rate, but providing that the premium on each risk is to be fixed at time of indorsement, according to the rates of the company when the character of the vessel and time of sailing are known,—if the insured, on giving timely notice of a shipment, state all the facts, the circumstance that the vessel was out of time does not exonerate the insurers; but it is for them to object on that account, and require the proportionate premium. *Rolker v. Great Western Ins. Co.*, 76.
2. A marine policy, insuring A. & Co., "on account of whom it may concern for outward shipments and homeward, to be for account of themselves and to be consigned to them by invoice and bill of lading,"—*Held*, on a view of the whole policy, not to mean outward shipments on account of whom it may concern, and homeward shipments only when made by invoice and bill of lading, and for account of themselves; but to include shipments on account of whom it may concern, whether outward shipments (approved by the insurers under another clause of the policy) or homeward shipments on account of the insured, or homeward shipments consigned to them on account of whom it might concern, by invoice and bill of lading. *Ib.*
3. One who has sold property with the stipulation that the title shall remain vested in him until payment, retains, until such payment,

- an insurable interest. *Tallman v. Atlantic Fire & Marine Ins. Co.*, 345.
4. The omission of the insured to notify to the insurers other insurance on the same property, as required by the policy, does not avoid the policy if the insurers had actual knowledge of the other insurance, and the insured was ignorant of it. *Rowley v. Empire Ins. Co.*, 131.
 5. Notice to the agent of an insurance company, who is authorized to take applications for insurance is notice to the company. *Ib.*
 6. Such an agent of an insurance company, in filling up a blank application for insurance, acts as the agent of the company rather than of the applicant. And a misstatement made therein by him, which is not induced by the instructions of the applicant, does not avoid the policy. *Ib.*
 7. The seller of machinery stipulated that he was to remain owner until it was paid for, and the buyers insured it for his security, the policy stating that the loss was payable to the seller. The buyers subsequently mortgaged the property to plaintiff, who foreclosed the mortgage and bought in the property. The agent of the insurers, knowing of the interest of the seller in the property and the policy, received from the seller's agent the premium for a renewal, and the same agent of the defendants had notice of subsequent insurances effected by plaintiff on the property through him as agent for other companies. *Held*, that the insurance for the benefit of the seller was valid, and the facts that the mortgage was unknown to him, and that there was other insurance by the mortgagee, did not prejudice the former insurance, and that after an assignment of the claim for a loss on the former insurance to plaintiff, he could recover thereon. *Tallman v. Atlantic Fire & Marine Ins. Co.*, 345.
 8. After the insurer's agent had, with knowledge of the facts, renewed for the benefit of the equitable owner, insurance first made in the name of the legal owners, additional insurance effected by one who acquired the title of the legal owners, without knowledge of the equitable owner, and without consent indorsed on his policy, does not prevent a recovery on such policy, even though the action therefor be brought by the person who effected such additional insurance, claiming as assignee of the former. *Ib.*
 9. The mistake of naming one who has no interest, as the insured in a policy of fire insurance, is cured by an indorsement, made by the secretary, with notice of such mistake, stipulating that the loss, if any, is to be payable to a mortgagee named. *Solms v. Rutgers Fire Ins. Co.*, 279.
 10. A recovery may be had in the name of the real party in interest in such a case, for the indorsement may be regarded as a new contract of insurance with him. *Ib.*
 11. An agent of an insurance company, authorized to receive applications and make them temporarily binding, pending the consideration of the risk, and to receive premiums on renewals, has not implied authority to consent to an assignment of a policy. *Stringham v. St. Nicholas Ins. Co.*, 315.
 12. Authority to give such consent is not to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made, although the person applying for the consent to the assignment may have supposed that such agent had authority to grant such consent. *Ib.*
 13. The pecuniary circumstances of a person on whose life insurance is applied for, are facts material to the estimation of the risk; and in an action on the policy, the effect produced on the mind of the medical examiner by a representation that the applicant is a moneyed man, is a proper subject of inquiry. *Valton v. National Loan Fund Life Ass. Society*, 437.
 14. A mutual insurance company formed under the general act of 1849, L. 1849, p. 441, ch. 308, may, under the power to determine "the mode and manner" of exer-

cising its powers, divide risks into classes according to hazard, so that a note shall, in the first instance, be assessed only for losses of the class to which he belongs. *White v. Ross*, 589.

15. But if need be, the whole assets, including notes on both classes, must be applied for payment of losses in either class. *Ib.*
16. The maker of a premium note given to a mutual insurance company, is liable to be assessed thereon for losses whether occurring on cash premium or note premium policies, the fund produced by cash premiums having been exhausted. *White v. Havens*, 582.
17. Under the act (*L.* 1854, p. 773, ch. 369, § 3, amending *L.* 1853, § 13),—providing that the directors of mutual insurance companies, making assessments, are to publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed,—the publication, in the absence of by-laws, is to be made according to the discretion of the directors; but where by-laws prescribe the mode of publication, their directions must be followed, and a defect therein is not aided by proof of a personal demand. *Sands v. Shoemaker*, 149.
18. The act of 1862 (*L.* 1862, p. 743, ch. 412), authorizing justices of the supreme court to refer controversies arising between receivers and members of mutual insurance companies, is not unconstitutional as impairing the right to a trial by jury. *Sands v. Harvey*, 47.
19. The words "controversy or disagreement," as used in that act, include actions regularly commenced by summons and complaint, and in which an answer has been put in. *Ib.*
20. In such a case, the order may be made by the court at special term, as well as by a judge out of court. *Ib.*

CONTRACT, 9.

INTERPLEADER.

Under section 123 of the Code of Procedure, it is proper to grant an order of interpleader to a defendant who admits the debt and desires to pay it, and alleges that a controversy as to the right to

collect it exists between the plaintiff and a third person, in which defendant has no interest; although it be not alleged that defendant is in doubt as to the right. *So held*, in foreclosure, where the third person claimed as the payee named in the mortgage, without, however, having possession of the mortgage, and plaintiff claimed as assignee, having possession of the mortgage, but no other evidence of title. *Taunton v. Groh*, 358.

JAIL.

ESCAPE.

JOINT-STOCK CO.

1. The liability of individual members of a joint-stock company, after judgment and execution unsatisfied against the company, under *L.* 1849, ch. 258, § 1, as amended by *L.* 1853, ch. 153, is that of partners, and consists in the original demand against the company, not the judgment against it. *Witherhead v. Allen*, 628.
2. The complaint therefore must allege a subsisting cause of action against the company, on the original demand. Alleging that the company became indebted to plaintiff for goods sold, without alleging a sum now due, or a breach in any form, is not enough, even where judgment and execution unsatisfied is alleged. *Ib.*

JUDGE.

INSURANCE, 20.

JUDGMENT.

1. A judgment rendered by a justice of the peace, while holding over after his term of office had expired, but before that of his successor commenced, can not be impeached collaterally. The office is continuing in its nature, and as he was in undisputed possession under apparent authority of law, his title can only be questioned in a proceeding directly involving that issue. *Read v. City of Buffalo*, 22.
2. A judgment, even though recovered in an action of *tort*, is a contract, within the provisions of the Code allowing a claim on con-

tract to be set up as a counter-claim, in any action on contract. *Taylor v. Root*, 882.

3. The original cause of action is merged in the judgment. *Ib.*
AMENDMENT, 2; APPEAL, 12; CONFES-
SION OF JUDGMENT; EVI-
DENCE, 9; FORECLOSURE,
1, 8; LIEN; MORTGAGE,
5; SALE, 8.

JUDICIAL SALE.

LOAN COMMISSIONERS, 1; PARTI-
TION, 8.

JURISDICTION.

PARTITION, 5.

LANDLORD AND TENANT.

1. Where the plaintiff demised a tract of land to the defendants for a term of years, and reserved to his own use a building thereon till a specified date before the expiration of the term, and, no demand being made by the defendants, continued to occupy the building after the time for which he had reserved it had expired,—*Held*, that this did not amount to an eviction by the plaintiff, since the defendants had never been in possession. *Vanderpool v. Smith*, 461.
 2. *It seems*, that if the tenants had demanded possession at the day appointed, refusal by the landlord to deliver up possession would not have constituted an eviction. *Ib.*
 3. In both the above cases the proper remedy of the tenants is an action on the landlord's covenant. *Ib.*
 4. Though the tenants, immediately upon the holding over (they not having demanded possession) notified the landlord of their intention to rescind the lease, the latter can recover rent of them for a subsequent quarter. *Ib.*
- CONTRACT, 3; REAL PROPERTY.

LEASE.

CONTRACT, 3; LANDLORD AND TEN-
ANT, 1.

LEGACY.

A bequest to a voluntary and unin-
corporated body of persons—

described as the "Arcot Mission,"—*Held*, invalid for want of a capable legatee. *Sherwood v.*

American Bible Society, 237.
CORPORATION, 1; FOREIGN CORPOR-
ATION, 1; WILL, 2.

LIBERTIES.

ESCAPE.

LIEN.

A specific equitable lien upon land is preferred to a subsequent legal lien by judgment. *Stevens v. Watson*, 302.

MORTGAGE, 7; TAXES.

LIMITATION OF ACTION.

1. The statute limitation against an action to redeem does not impair the right of the party, if in legal possession, to defend his possession. *Wells v. Pierce*, 559.
2. The short limitation provided by 2 R. S. 89, § 38, in the case of a claim disputed or rejected and not referred, is only applicable where the presentment and rejection take place after publication of notice to creditors. *Tucker v. Tucker*, 428.
3. A written promise is not necessary in order to take out of the statute of limitation a demand which had accrued and had not been barred when the Code of Procedure took effect. *Van Alen v. Feltz*, 439.

SUSPENSION OF POWER OF ALIEN- TION.

LOAN.

USURY, 3.

LOAN COMMISSIONERS.

1. Where both the commissioners for loaning United States moneys are present at, and make, a sale of mortgaged premises, the fact that the entry of the sale in the book of minutes, though purporting to be the act of both, was made by one only of them, and was signed only by him, does not amount to a fatal irregularity. *White v. Lester*, 585.
2. The omission of the loan commis-
sioners to enter in their minute book the order for, and a copy of the advertisement of sale, and a designation of the places where,

and the persons by whom, the advertisement was posted, does not affect the vitality of the sale, as against a *bona fide* purchaser, ignorant of the irregularity. *Id.*

LOST PAPER.

BILLS, NOTES AND CHECKS, 3.

MARRIED WOMAN.

CONFESSION OF JUDGMENT.

MASTER AND SERVANT.

NEW TRIAL, 1.

MISDEMEANOR.

ARREST.

MISNOMER.

Under the Code of Procedure, the only way to take advantage of a mere misnomer,—*e. g.*, the bringing of an action by a married woman in her maiden name,—is by answer; if not set up by answer, advantage can not be taken of it on the trial. *Traver v. Eighth-ave. R. R. Co.*, 422.

PLEADING, 1

MISTAKE.

REFORMATION OF INSTRUMENT, 1.

MONEY PAID.

BILLS, NOTES, AND CHECKS, 1 ;
CONTRACT, 10.

MONEY RECEIVED.

SALE, 9.

MORTGAGE.

1. A *bona fide* assignee for value, of a mortgage of land, originally given as consideration for a fraudulent transfer of the land, may foreclose the mortgage, notwithstanding the transfer has been adjudged void as against creditors. *Smart v. Bement*, 253.
2. Although the assignee of one, who, by his own false representations was estopped from setting up, against a mortgage made by him, an outstanding title, is likewise estopped,—he is not precluded from purchasing such out-

standing title, and then setting it up against the mortgage. *Wells v. Pierce*, 539.

3. After assigning a part interest in a mortgage, the mortgagee accepted from the mortgagor a conveyance of the land, instead of foreclosing, and subsequently the assignee of the part interest in the mortgage procured the mortgagee to convey the premises to one to whom he had agreed to sell his interest in the mortgage, and he received from the latter, as the agent of the mortgagee, promissory notes for the value of the mortgagee's interest.

Held, 1. That the mortgagee was not bound to satisfy the mortgage without payment of the notes.

2. That the mortgagee was a necessary party to an action to compel satisfaction of the mortgage. *Ranger v. Goodrich*, 1.

4. *It seems*, that where a transfer is set aside as fraudulent as against creditors, a mortgage, given by the fraudulent transferee in consideration of the transfer, and assigned to a *bona fide* purchaser for value, is, as between the parties to the fraud and their creditors, chargeable wholly to the former; and on its foreclosure the creditors are entitled to the whole surplus. *Smart v. Bement*, 253.

5. A mortgage of all the property of a railroad company already or afterward to be acquired, in equity binds after acquired property, as against the mortgagors, and all persons claiming under them, except purchasers for value and without notice; and especially as against claimants under a junior mortgage, which by its terms is subject to the prior mortgage, and against junior judgment creditors. *Stevens v. Watson*, 302.

6. The legal assumption is that the after-acquired lands were necessary for the company, and were properly acquired by it. *Id.*

7. A mortgagee, who by fraud of the owner of the equity of redemption is induced to release part of the land from the lien of the mortgage, and thus enables the latter to convey it, which he

does, so that the lien of the mortgage can not be restored, is entitled to recover from him the amount of the lien so released; not merely the deficiency which may result on the mortgage. *Stebbins v. Howell*, 297.

DEED, 5; FORECLOSURE, 2; HUSBAND AND WIFE, 1; LIMITATION OF ACTION, 1; LOAN COMMISSIONERS, 2.

MOTIONS AND ORDERS.

APPEAL, 8.

MUNICIPAL CORPORATION.

A municipal corporation is liable in an action for negligence in the construction of a work under a street, undertaken by an individual for private benefit, where the work is done under permission of the corporation, with a condition that it is to be done under direction of a proper officer of the corporation, and no such supervision is bestowed by them upon it. *Wendell v. Mayor, &c., of Troy*, 563.

ARREST; EVIDENCE, 8.

NEGLIGENCE.

HIGHWAYS, 2; MUNICIPAL CORPORATION.

NEW TRIAL.

The common-law rule that the admission of incompetent evidence is ground for reversal unless it appears that the appellant could not have been injured by it,—applied. *Wilson v. Wilson*, 621.

2. On a motion for a new trial on the ground of excessive damages, the court may refuse to set aside the verdict, if plaintiff will consent to deduct the amount deemed excessive. *Sears v. Conover*, 179.

TRIAL, 1.

NOTICE.

ADMEASUREMENT OF DOWER, 1; INSURANCE, 5.

OFFICE.

JUDGMENT, 1.

OFFICERS.

Officers compensated by a commission, are, in the absence of agreement, entitled to share equally, although the labor be not equally shared. *White v. Bullock*, 578.

BUILDING ASSOCIATION; EVIDENCE, 8; HIGHWAYS, 1.

PARENT AND CHILD.

Where a minor child is injured by negligence, the parent may recover for the loss of service for the remainder of the period of minority; and, if the disability continue beyond that period, the child may recover for such further loss. *Traver v. Eighth-ave. R. R. Co.*, 422.

PARTIES.

Trustees must all unite in bringing an action on behalf of the estate. *Thatcher v. Candee*, 387.

BANKING; CARRIER, 2; CONTRACT, 12; COUNTER-CLAIM, 1; CREDITORS' ACTION, 1, 2; DEFENSE, 2; EJECTMENT, 3; FORECLOSURE, 1; INSURANCE, 8, 10; INTERPLEADER; PLEADING, 4; SALE, 10.

PARTITION.

1. Where land, of which one undivided share is held in fee, and the other undivided share in tenancies for life and in remainder, is conveyed in parcels, by successive deeds, to different persons, the later conveyances expressly referring to the former and being subject thereto, the court, on making partition between the owners of the undivided interests, should give effect to the earliest conveyances in preference to the later. *Warfield v. Crane*, 525.

2. The principle of partition is the same where a sale is necessary, as where actual partition is made; and the rights of the parties in the proceeds of sale are the same as in the lands themselves. *Id.*

3. Where the equities of the case give some of the parties an interest in specific parcels, they are entitled to have the actual value of such parcels ascertained; and

a judgment directing that the value of the parcels assigned on account of such equities, shall be estimated at the same rate as the other parcels bring upon a sale, is error, unless it appears by the record that it did not work injustice. *Ib.*

4. A judgment in partition is not defective because the affidavits on which service of summons by publication was ordered did not allege the non-residence of the parties who were thus served, and stated on information and belief the inability to find them within the State. *Van Wyck v. Hardy*, 496.
5. It is enough to give jurisdiction that the fact that the defendants could not with due diligence be found within the State, appeared to the satisfaction of the judge to whom the application was made. *Ib.*

AMENDMENT, 2.

PARTNERSHIP.

1. Two mercantile firms mutually agreed each to put out contracts for sale and delivery of produce at future days, all profits of such adventures and all losses, to be equally divided between the firms. *Held*, that the members of one firm were liable with the other, as partners, upon a contract which the other firm made and signed in their own name, pursuant to this agreement. *Smith v. Wright*, 274.
2. Although, every member of a firm, is, in a sense, a general agent of the firm, a firm is not necessarily the agent, general or special, of any other firm in which either of its members is a partner. *Wright v. Ames*, 644.

DEFENSE, 2.

PAYMENT.

1. A creditor does not exonerate his debtor by agreeing with a third party who assumes payment of the debt, to receive payment from the latter in negotiable paper, if the agreement is never carried into effect. Giving credit in account for such paper, under a mistake, is not conclusive on this question. *Rice v. Isham*, 87.

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2. The fact that a collecting agent, upon presenting a draft, receives the drawee's check upon a local bank for the amount, and surrenders the draft to the drawee, who stamps it "paid," is not payment, so as to discharge the drawer, if the check on due presentment is refused payment. *Turner v. Bank of Fox Lake*, 434.

3. It is not laches in the presentment of such a check, to present it through the clearing-house, the day after it is received, if this be proven to be the usage of the place.

CONTRACT, 10; MORTGAGE, 2;
SALE, 11.

PERPETUITIES.

Charitable donations of a public nature, if contingent and executory, form no exception to the law against perpetuities. *Rose v. Rose*, 108.

PLEADING.

1. A mere misnomer in pleading is a formal error, amendable in the court of original jurisdiction; and will not be noticed in this court. *Traver v. Eighth-ave. R. R. Co.*, 422.
2. Where the making of a contract giving credit is induced by fraud, the creditor may sue upon the implied agreement founded on the consideration of the contract, and may prove the fraud under the ordinary complaint for goods sold, &c., for the purpose of avoiding the stipulation as to credit. *Weigand v. Sichel*, 592.
3. In a suit for damages on the breach of a contract, the complaint is defective unless it avers a formal tender of performance on the part of the plaintiff (no excuse being shown). *Smith v. Wright*, 274.
4. In an answer alleging a defect of parties, defendant must state precisely and truly who were the parties, and an error wholly vitiates the answer. Thus in an action for goods sold, an answer that A. and B. were partners with defendant and should have been joined, is not sufficient to admit proof that

A. was a partner. *Weigand v. Schol*, 502.

CAUSE OF ACTION; EJECTMENT, 3;
EVIDENCE, 25; JOINT-STOCK
COMPANY, 2; MISNOMER: USURY, 2.

PLEDGE.

BILL OF LADING, 5.

POWER IN TRUST.
TRUST, 2.

POWER OF ATTORNEY.
ASSIGNMENT, 4.

PRINCIPAL AND AGENT.

1. An agent can not create an authority in himself to do a particular act, by its performance, or by asserting his authority to do it. To bind the principal the agency must be established, and one of so general a nature as to give him authority to do the act in question or a subsequent ratification with full knowledge, must be proved. *Stringham v. St. Nicholas Ins. Co.*, 315.
2. An agent can not retain for himself, any of the profits or advantages of a contract made by him, except by the principal's consent, given with full knowledge of the facts. *Wilson v. Wilson*, 631.

FACTOR; PARTNERSHIP, 2.

PRINCIPAL AND SURETY.

One standing in the position of a surety is not exonerated by an agreement of the creditor to give time to the principal debtor, if the agreement was made with the consent of the former. *Rice v. Isham*, 37.

APPEAL, 12.

PRIVATE WAY.

The rule that a grantee of land is entitled to a way of necessity over the land of his grantor, is applicable, where instead of a formal there is an equitable grant of the title with the right of possession. *Simmons v. Sines*, 246.

PUBLICATION.

INSURANCE, 17; PARTITION, 4;
SERVICE AND PROOF, 1.

QUESTION OF LAW AND FACT.
DAMAGES, 2; EVIDENCE, 19, 31;
SALE, 12; USURY, 3.

RAILROAD COMPANIES.

1. Defendants, a railroad corporation, in soliciting a loan of money, offered to give lenders their bonds, and the privilege of becoming stockholders in the company to half the amount of their loan. Plaintiff subscribed to the loan and received a provisional certificate declaring him to be entitled to the scrip certificates for shares of stock after a certain day fixed. At the bottom of the certificate was a memorandum, stating that the exchange of the provisional certificates for the scrip certificates was "limited to 1st January, 1855." The year was intentionally left blank, but by a vote of the company was afterwards fixed at 1855. In 1857, plaintiff having paid up the whole amount of his subscription to the loan, and having offered to pay all installments that had been called on the stock, with interest thereon, demanded the stock of the company, which was refused. *Held*, that having accepted the terms offered by the company, and complied with all the conditions in regard to the loan, his right to the stock became absolute and was not cut off by the notice on the provisional certificate. *Van Alen v. Illinois Central R. R. Co.*, 443.
2. *It seems*, it would have been the same if the date had been filled in when the certificate was issued. *Id.*
3. The provisions of the general railroad act, making the section requiring companies to construct fences and gates applicable to pre-existing companies, if not inconsistent with their characters, makes it apply to a company whose charter required it to construct fences, and left it to the land-owners to make gates. *Stearns v. Hudson River R. R. Co.*, 287.
4. The provisions of law requiring railroad companies to fence, &c., are to be regarded not merely as a regulation between land-owners, but are to have an extended application as a police regulation for the safety of the public. *Id.*

5. The general railroad act of 1850 requires the companies to erect fences of sufficient height and strength to prevent cattle and other animals from getting upon the railroad. *Tallman v. Syracuse, &c. R. R. Co.*, 351.

6. The fact that the language of the act requires such fences to be of the height, &c., of a division fence required by law, while the statutes prescribe no height, &c., for division fences, does not render the act inoperative. *Ib.*

MORTGAGE, 5.

RATIFICATION.

SALE, 2, 9.

REAL PROPERTY.

Where a building is erected upon the land of one person by another person, without any authority or agreement in respect thereto, it becomes a part of the realty, and passes with a conveyance of the land; and to take the case out of this principle, on the ground that the building was erected by a tenant for purposes of trade and business, it is not enough to show that it was occupied for the purposes of business, but the existence of the relation of tenant must be made out by express proof or clear implication, and it must also be shown that the building was erected by the tenant for the purposes of trade or business, and that he exercised his right of removal during the term. *Richtmyer v. Moses*, 55.

RECEIVER.

DEED, 5; INSURANCE, 18.

RECORDING DEED.

DEED, 1.

REFEREE.

CONTEMPT, 1; EVIDENCE, 10.

REFERENCE.

1. An exception does not lie to the report of a referee, upon the ground that he has refused to find upon a question of fact other than the issues in the cause. *Wittie v. Eadie*, 624.

2. This court will not reverse a judgment entered on the report of a referee, on the ground that the action was not referable, if it be one that *might* require the examination of a long account, and the affidavits on which it was ordered are not brought before the court on appeal. The presumption is that the necessary facts were shown. *Van Marter v. Hotchkiss*, 484.

INSURANCE, 18.

REFORMATION OF INSTRUMENT.

1. A court of equity may reform a written contract, upon parol evidence of fraud or mistake, although the contract be one which the statute of frauds requires to be in writing. *Rider v. Powell*, 63.

2. *It seems*, that the mistake must be mutual, or fraud be shown. *Ib.*

RELEASE.

ACCORD AND SATISFACTION; MORTGAGE, 7; SALE, 10.

RELIGIOUS CORPORATION.

1. A subscription made at the formation of a religious society, but before its incorporation, for the use and benefit of the society and to carry out its objects,—*e. g.*, toward the erection of a building, and to the support of a minister,—is presumed legal, in the absence of evidence to the contrary; and upon the subsequent incorporation of the society, under *L. 1818, ch. 60, § 4*, the trustees became vested with the right to collect the subscription. *Reformed Protestant Dutch Church v. Brown*, 31.

2. Where land is conveyed to individuals as trustees of a religious corporation, in trust for the purposes of the corporation, the statute of trusts vests the legal title in the corporation; and an action to recover possession should be brought in the name of the corporation, and the individual grantees should not join as plaintiffs. *Van Deuzen v. Trustees of Presbyterian Congregation*, 465.

REMAINDER.

The uncertainty which makes a re

mainder contingent is uncertainty as to who will take at any given time, if the precedent estate should then terminate. If there are persons in being who would be entitled to take if the precedent estate should presently determine, their interest is a vested future estate, under the revised statutes, notwithstanding that it may be liable to be defeated.—*e. g.*, by the death of such a person, before the precedent estate actually determines. *Sheridan v. House*, 218.

RENT.

ACTION, 3; CREDITORS' ACTION, 4;
LANDLORD AND TENANT, 4.

REPLEVIN.

SALE, 8.

SALE.

1. The case of an agreement to deliver a specified number of cords of firewood, to be cut from standing trees, is not a contract for manufacture, but is a sale, within the meaning of the statute of frauds. *Smith v. N. Y. Central R. Co.*, 262.
2. The employer of a building contractor, authorized the contractor to buy lumber, and give an order upon him (the employer), for the price, promising to pay, and charge it upon the contract. The contractor bought the lumber on the credit of the employer's name, and, after it was delivered upon the employer's premises, the bill for the lumber was presented to the employer, who then promised verbally to pay it. *Held*, that although the employer was not rendered liable by the purchase and delivery in his name, instead of in the contractor's name with an order on him for payment,—his subsequent promise to pay operated as a waiver of the order, and a ratification of the contractor's agency in the purchase. *Watson v. Gray*, 540.
3. A seller of goods for cash on delivery, who delivers without payment, can not recover possession from the master and owners of a vessel on which they have been shipped, after the master, in the

usual course of business, and without notice, has given a negotiable bill of lading therefor to the fraudulent buyer. *Western Transportation Co. v. Marshall*, 575.

4. Third persons making advances to the fraudulent buyer, in good faith and without notice, on the credit of such bill of lading, are also protected. *Id.*
5. The rule that one purchasing in good faith from a fraudulent vendor acquires a good title, is applicable to such cases. *Id.*
6. An executory sale of an interest in a vessel yet to be built, passes no interest in the vessel when it comes into existence, as against a purchaser after that time having no notice of the previous sale. *Seymour v. Montgomery*, 207.
7. A buyer having paid for chattels, to be delivered at a future day, is not bound to receive them after that day has passed, unless the delay was caused by his acts before the day, or unless he has waived punctual performance. *Rouse v. Lewis*, 121.
8. The retaking of the merchandise by the seller, in *transitu*, from the possession of the carrier, in an action of replevin of which the transferee of the bill of lading had no notice, and the recovery of judgment in favor of the seller, in such action, do not bar the right of the transferee of the bill of lading to maintain an action against the seller for conversion. *Rawls v. Deshler*, 12.
9. A seller of merchandise, with a lien for the price, who, with knowledge that the buyer has obtained advances upon a consignment of it to factors abroad, sues the buyer, on contract, for the price, thereby ratifies the sale, and can not afterward recover against the consignees in an action for money received. *Wilmot v. Richardson*, 614.
10. The buyer of a chattel which was mortgaged, delivered to the mortgagee a part of the consideration of the sale, upon an understanding between all parties that the latter should relinquish his claim on the chattel and look to the mortgagor for the balance due on the mortgage. *Held*, that

though he gave no formal discharge, he could not afterwards enforce the mortgage against the buyer of the chattel. *Rickerson v. Raeder*, 60.

11. When the maker of an article takes it back after delivery, because it remains unpaid for, the presumption is that the sale is rescinded, unless there is some evidence to show an intent to take it for the purpose of resale on the buyer's account, or otherwise not to discharge the debt due for the price. *Sloane v. Van Wyck*, 250.
 12. If the evidence is conflicting, it is a question for the jury. *Ib.*
- BILL OF LADING, 8; EVIDENCE, 13, 18; INSURANCE, 8; SHIPPING; TAXES.

SATISFACTION.

MORTGAGE, 2.

SCHOOL.

EVIDENCE, 28.

SERVICE AND PROOF.

1. An order for publication of summons is satisfied by the publication of a copy substantially correct. An omission of unnecessary words can not vitiate. *Van Wyck v. Hardy*, 496.
2. It is enough if the designation of the place for serving the answer, is as specific as is usual in ordinary correspondence between individuals in relation to the most important business. *Ib.*
3. "Forthwith," in the provision of the statute, as to the time of mailing, means without delay; and a reasonable time must be allowed, in view of the circumstances of each case :—in this case four days. *Ib.*

PARTITION, 4.

SET-OFF.

The code of procedure has not altered the rule of 2 R. S. 354, § 18, subdivisions 7, 9, that a claim existing against the assignor, and in favor of the maker of a promissory note, which was assigned for value before it became due, although with notice of the offset, can not be set off against the note

in the hands of the assignee. *Williams v. Brown*, 607.

SEWERS.

HIGHWAYS, 2.

SHERIFF.

CONGRESS.

SHIPPING.

Four parties agreed to build a vessel, each to contribute one-quarter of the cost, and each to be one-quarter owner, and two of them to be each entitled to buy the shares of the others. *Held*, that one of them who accordingly purchased the share of another, could not defend an action for the price, on the ground that before building the vessel, the vendor had made an executory sale of the same share to another of the four, and received a part of the price. *Seymour v. Montgomery*, 207.

BILL OF LADING, 6.

SPECIAL PROCEEDING.

APPEAL, 4.

STATUTE.

A statute which does not take away any right, nor impose a substantially new duty, but regulates with additional requirements, a duty imposed by a previous act, is not to be deemed inconsistent with the previous act. *State v. Hudson River R. R. Co.*, 287.

RAILROAD CO., 4, 6.

SUBSCRIPTIONS.

RELIGIOUS CORPORATION, 1.

SUMMONS.

AMENDMENT, 2; PARTITION, 4; SERVICE AND PROOF, 1

SUPERVISORS

COUNTY.

SURROGATE.

The surrogate, upon a final or litigated accounting of an executor or administrator, has no jurisdiction to try the validity and amount of

a disputed demand against the estate. *Tucker v. Tucker*, 428.

APPEAL, 2; ARBITRATION; EXECUTORS AND ADMINISTRATORS, 2, 4.

SUSPENSION OF POWER OF ALIENATION.

1. The conferring of the naked legal title upon executors, does not prevent a bequest from being void for suspending the real ownership of the fund, contrary to the statute. *Rose v. Rose*, 108.
 2. Where a primary gift, not vested, is declared void for being made contingent on an event other than the determination of one or two lives, the limitation over, dependent on the same contingency, is void also, and can not be sustained by regarding it as accelerated and vested immediately. *Ib.*
- PERPETUITIES; WILL, 2.

TAXES.

After sale of personal property on execution issued on a voidable judgment, whether the property actually belonged to the judgment debtor or to another, a tax, subsequently levied on the debtor, constitutes no lien on the property, and a purchaser of the property at the tax sale acquires no title. *Roraback v. Stebbins*, 100.

TREES.

SALE, 1.

TRESPASSER.

A trespasser can not defend an action brought by one in possession of land, claiming to be owner, by alleging a breach of a condition in the deed under which plaintiffs claim. *Robie v. Sedgwick*, 73.

TRIAL.

Admission of evidence, which, in itself, is immaterial and, therefore, by the general rule, no ground for reversal, becomes a ground of reversal, if subsequent testimony of the unsuccessful party, upon a material point is inconsistent with it, and it may have had weight in discrediting such testimony, and leading to the judgment ap-

pealed from. *Wilson v. Wilson*, 621.

3. An objection that a witness's answer of a question is irrelevant, must be so expressed as to point to the particular answer, not to the whole of his testimony. *Wilson v. N. Y. Central R. R. Co.*, 618.
3. The rule that a defendant relying on a defect of proof as a ground for a nonsuit, must make a distinct objection on the particular point,—applied to the case of an action on a premium note, without specific proof that the losses were such as the note could be assessed for. *Landa v. Shoemaker*, 149.
4. A request to charge should be couched in clear and unequivocal terms, to render available an exception to the judge's refusal to comply. *Van Vechten v. Griffiths*, 487.
5. The judge should refuse to instruct the jury as to the effect of a fact alleged by one of the parties, but not substantiated by any evidence. *Rousse v. Lewis*, 121.
6. The remedy for error in comments on the facts, made by the judge at the trial, is by asking for fuller explanations or for a submission of the question to the jury, without doing which an exception does not lie to his mere comments or expression of opinion on the testimony. *Van Vechten v. Griffiths*, 487.

APPEAL, 9; EVIDENCE, 25;

INSURANCE, 18.

MISNOMER.

TRUST.

1. A trust of real and personal estate, providing for the payment of debts, and reserving the income of the surplus for the use of the grantor, is valid as against subsequent creditors, at least as to the real property, after the personal property has been appropriated. *Rome Exchange Bank v. Eames*, 83.
2. The rule that a trust, failing as such, because not authorized by statute, may be valid as a power in trust, may have effect, although it gives the trustees the direction and management of a manufac-

turing establishment during the life of a beneficiary. *Downing v. Marshall*, 662.

3. A trustee can not divest himself of the obligation to perform the duties of his trust, without an order of the court, or the consent of all the *cestuis que trust*. *Thatcher v. Candee*, 387.

ASSIGNMENT FOR BENEFIT OF
CREDITORS; CONTRACT, 2;
DEED, 8; PARTIES;
WILL, 3.

UNDERTAKING.

APPEAL, 12.

UNDUE INFLUENCE.

Undue influence, to avoid a will, must be an influence exercised by coercion, imposition or fraud; not merely such as arises from the influence of gratitude, affection or esteem. It must be the ascendancy of another will over that of the testator. And it must be proved; it will not be inferred from opportunity and interest. *Seguine v. Seguine*, 191.

USAGE.

PAYMENT, 3.

USURY.

1. The question of usury is one of intention; and where a note is discounted for an amount which *prima facie* would indicate the taking of usury, this presumption may be rebutted by showing that it was agreed between the parties that no more than legal interest should be collected on the note. *Shoop v. Clark*, 235.
2. In suing on such a note, it is not a material variance to plead the note in the usual form adopted, where the whole amount is sought to be recovered, and then to prove the special character of the discount, to repel the defense of usury. *Id.*
3. A loan, at the full lawful rate of interest, made in bills which were at the time unbankable, and depreciated one per cent. below par, but were current at par in ordinary transactions among individuals, and were not proven to have been originally received by the

lender, nor to have been passed by the borrower, below par, is not necessarily usurious; but the question is one of intent, and must be submitted to the jury. *Robbins v. Dillaye*, 71.

4. Illegality by reason of usury can not be imputed to the contracts of corporations as borrowers. *Stevens v. Watson*, 302.

VARIANCE.

BILL OF LADING, 8; USURY, 2;

VENDOR AND PURCHASER.

CONTRACT, 2.

VERIFICATION.

AMENDMENT, 2.

VILLAGE.

1. A village corporation having power by charter to make local improvements, is liable to one employed by it to do the work, for his compensation. *Woolsey v. Village of Rondout*, 639.
2. In such action, the trustees' certificate of indebtedness or of the amount due is admissible, without producing the records. It is not regarded as secondary evidence. *Id.*

WAIVER.

CONTRACT, 11; SALE, 2, 7.

WARRANT.

CONGRESS.

WILL.

1. A competent testator free from undue influence, may make whatever will he choose, though unjust and unreasonable. *Seguine v. Seguine*, 191.
2. The testator gave his executors the residue of his estate, with directions that if a specified sum were contributed within five years from his death to establish a beneficent association he desired, should be formed, the executors should pay over the residue to such association; but if the association were not formed, or the specified sum not contributed within that time,

they were to pay the residue to other beneficiaries.

Held, 1. That the real ownership of the residue would thereby be suspended for a period which might be more than two lives, and therefore the primary request was void.

2. That the secondary bequest, since it was subsequent and depended on the same event, was also void. *Rose v. Rose*, 108.

3. If a part of the beneficiaries designated by the testator, can not take, by reason of which the heirs succeed to their portion of the estate, the heirs must take, subject to the power to manage the property and apply and divide the proceeds between the beneficiaries who can take and the heirs. *Downing v. Marshall*, 662.

CORPORATION, 1; FOREIGN CORPORATION, 1; LEGACY;
UNDUE INFLUENCE.

WITNESS.

1. Under the married women's acts, and the provisions of the code of procedure in 1860, a wife might, as a party to an action, testify on her own behalf like any other party, irrespective of the interest of her husband, except that she could not be required to disclose communications made by one to the other. *Wehrkamp v. Willet*, 548.
2. On the question of the practical location of a boundary, it is competent to ask a witness whose residence and relation to the parties has been such that, had there been a difference between the adjoining

proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. *Ratchiffe v. Cary*, 4.

3. It is competent to prove by a surveyor, that the courses and distances in a deed are incongruous, and that all the lines indicated by monuments, differ in length from the deed. *Ib.*

4. Witnesses are competent to prove the general correctness of plaintiff's day-book who have settled their accounts by his ledger, which was posted from the day-book. *Stroud v. Tilton*, 824.

5. A witness can not be required to put a question to a person in court to elicit information—*e. g.*, as to the full name of a person of which she professes to be ignorant. *Wehrkamp v. Willet*, 548.

6. In impeaching a witness by the direct examination of another witness, the only proper inquiry is, as to the general moral character, and the public reputation of the former, as a truthful or untruthful person. It is not permissible to inquire into specified acts of immorality or misconduct. *Ib.*

7. The affidavits on which a new trial was ordered, though served on the attorney of the adverse party and not contradicted, are not admissible on the trial to impeach testimony given there by such adverse party. *Ib.*

CONGRESS; CONTRACT, 6; EVIDENCE,
12, 16, 18; INSURANCE, 18;
TRIAL, 2.

TABLE OF SOME CASES

In which opinions or memoranda prepared by Judges of this Court
have been elsewhere printed ; but which are not reported in
this series, for the reasons below assigned.

- Barringer v. Hammond**, 4 *Transc. App.* 115. Mere reiteration of settled law.
- Baudouine v. Hart**, 5 *Transc. App.* 267. The decision determined no question of law.
- Bingham v. Disbrow**, 5 *Transc. App.* 198, reversing 14 *Abb. Pr.* 251 ; S. C., 37 *Barb.* 24. The judges did not agree on the ground of reversal, and the decision is not authority for anything. As to the competency of the wife, see *Rivenburgh v. Rivenburgh*, 47 *Barb.* 419 ; *Manchester v. Manchester*, 24 *Vt. (Deane)* 649 ; *Royal Ins. Co. v. Noble*, 5 *Abb. Pr. N. S.* 54 ; *Minier v. Minier*, 4 *Lans.* 421 ; *Southwick v. Southwick*, 49 *N. Y.* 510, affirming 9 *Abb. Pr. N. S.* 109.
- Bissell v. Studley**, 8 *Keyes*, 213. Merely applies the rule that the court will not reverse if no exception was taken below.
- Blydenburgh v. Johnson**, 7 *Transc. App.* 22. Determined no question of law.
- Brooks v. Van Every**, 8 *Keyes*, 27. That no exception lies to refusal of referee to find facts requested. For the present rule see *Mason v. Lord*, 40 *N. Y.* 476 ; and *Wiltsie v. Eadie* in this vol.
- Chapman v. Thomas** (Dec. 1868). Determined no question of law. The opinion of **WOODRUFF, J.**, and briefs of counsel will be found in 4 *Keyes*, 246.
- Clark v. Mayor, &c. of N. Y.**, 1 *Keyes*, 9. A majority of the court did not concur in this opinion.
- Curtis v. Butts**, 8 *Keyes*, 626. Determined no question of law.
- Davis v. Keyes and Knox**, 5 *Transc. App.* 352. Determined no question of law. See also, 38 *N. Y.* 94.
- Depuy v. Strong**, 3 *Keyes*, 603. Officially reported in 37 *N. Y.* 372.
- Douglass v. Day**, 3 *Keyes*, 434. Determined no question of law.
- East River Bank v. Kennedy**, 4 *Keyes*, 279. Overruled in *Dickson v. Broadway, &c. R. R. Co.*, 47 *N. Y.* 507, because it inadvertently fails to distinguish between appeals from orders granting new trials in actions tried by a jury and in those tried by a court or referee. For the present rule see *Downing v. Kelly*, 48 *N. Y.* 433 ; *Randolph v. Loughlin*, *Id.* 456 ; *Wright v. Hunter*, 46 *Id.* 409.
- Erben v. Lorillard**, 2 *Keyes*, 567. A majority did not concur in the ground of reversal.
- Fells v. Vestvali**, 2 *Keyes*, 152. Merely applies to a trivial case, and, without discussion, the familiar rule, that under a complaint on a *quantum meruit*, plaintiff may recover on proof of a special contract, fully performed by him. See *Farron v. Sherwood*, 17 *N. Y.* 227 ; *Hosley v. Black*, 28 *Id.* 438 ; and see *Marsh v. Holbrook*, vol. 3 of this series, p. 178.
- Gilbert v. Gilbert**, 1 *Keyes*, 159. This is a dissenting opinion. The court adopted the opinion of **SELDEN, J.** See the decision in vol. 2 of this series, p. 256. Compare *Siemon v. Schurch*, 29 *N. Y.* 598.

- Godfrey v. Johnston, 1 *Keyes*, 556. Determined no question of law; merely affirms, because the case presented only questions of fact. For fuller authorities on this rule see Phelps v. McDonald, 26 *N. Y.* 82; Wiltse v. Eaddie, p. 624 of this vol.; Parker v. Jervis, vol. 3 of this series, p. 449; Farnham v. Hotchkiss, vol. 2, p. 93, and Chamberlain v. Prior, vol. 1, p. 338; Barker v. White, *Id.* 95; Buntun v. Orient Mut. Ins. Co., *Id.* 257. compare Comstock v. Ames, *Id.* 411; Mason v. Lord, 40 *N. Y.* 476.
- Goodyear v. Bishop, 2 *Keyes*, 651. Reiteration of rule that the case must contain the referee's findings, and the exceptions.
- Herrick v. Ames, 1 *Keyes*, 190. It does not appear that a majority of the court concurred in either opinion. The case is of no value as a precedent.
- Heserodt v. Williams, 3 *Keyes*, 216. Determined no question of law.
- Kelsey v. King, 1 *Transc. App.* 183; S. C., 33 *How. Pr.* 39. This court affirmed the judgment of the supreme court, reported in 32 *Barb.* 410, with costs; but a majority of the judges did not concur as to the grounds of affirmance.
- v. Rowan, 2 *Keyes*, 603. Merely reiterates the rule that this court can not overrule the findings of fact. See Godfrey v. Johnson, in this table.
- Little v. Denn, 1 *Keyes*, 235. The court did not adopt this opinion, nor was the cause determined at all at this time; but a reargument was granted, and a different decision made at a subsequent term. 34 *N. Y.* 452.
- Lyman v. Wilber, 3 *Keyes*, 427; 2 *Transc. App.* 302. Determined no question of law.
- Main v. Niles, 1 *Transc. App.* 287. Determined no question of law.
- McReynolds v. Munns, 2 *Keyes*, 214. The court did not concur in the opinion, but dismissed the appeal. For the authorities as to the non-appealable character of the order, see Jones v. Derby, 16 *N. Y.* 242, and cases cited; Buffalo Savings Bank v. Newton, 23 *Id.* 160; Dows v. Congdon, 28 *Id.* 122.
- Moss v. Brisbane, 3 *Keyes*, 453. Determined no question of law.
- N. Y. & N. H. R. R. Co. v. Ketchum, 3 *Keyes*, 24. Determined no question of law.
- People v. Barrie, 4 *Transc. App.* 76. This was a dissenting opinion.
- v. Lamb, 2 *Keyes*, 360. The court were not agreed upon the grounds for affirmance. For the rule as to evidence of character, see Remsen v. People, 43 *N. Y.* 6; reversing 57 *Barb.* 324.
- Sandford v. Ruckman, 6 *Transc. App.* 68. This was a dissenting opinion.
- Shaw v. Smith, 3 *Keyes*, 316. Determined no question of law.
- Smith v. Martin, 3 *Keyes*, 373. Determined no question of law.
- Thompson v. Bennett, 2 *Keyes*, 503. Necessary information for stating actual decision of the court wanting.
- Van Rensselaer v. Bouton, 3 *Keyes*, 260. Mere reiteration.
- Vaters v. Green, 3 *Keyes*, 385. Determined no question of law.
- Williams v. Birch, 2 *Transc. App.* 133. Reported as Williams v. Tilt, in 36 *N. Y.* 319. Decision in the court below reported in 6 *Bosc.* 299.
- Wright v. Paige, 3 *Keyes*, 581. This is the opinion of the supreme court, reported previously in 36 *Barb.* 438.
- v. Sanders, 3 *Keyes*, 323. Determined no question of law.



